ROGER BROOKE TANEY

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STATUE OF ROGER BROOKE TANEY

LIFE OF
ROGER BROOKE TANEY

Chief Justice of the United States Supreme Court

BY

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BALTIMORE
WILLIAMS & WILKINS COMPANY
1922

COMPOSED AND PRINTED AT THE
WAVERLY PRESS
BY THE WILLIAMS & WILKINS COMPANY
BALTIMORE, MD., U. S. A.

PREFACE

The presence of four men in Maryland secured in that State the success of the sympathizers with the Union in 1861. Three of these men were politicians and lawyers: John Pendleton Kennedy, Reverdy Johnson, and Henry Winter Davis. The fourth was a jurist—Roger Brooke Taney. The life of Kennedy was written by Tuckerman and needs not to be written again. Those of Johnson and Davis, it has been the privilege of the author of this work to write. The life of Taney has been written by Samuel Tyler and was published in 1872. That portly volume is invaluable to every student of Taney's life, both because the author was a friend of the Chief Justice and gathered information which would otherwise have been lost and because the book contains a very valuable autobiography of Taney's early years. Yet the book was styled by a contemporary reviewer, as a "panegyric rather than a biography," was written uncritically, is nearly fifty years old, did not include the information now to be gained from Taney's correspondence with President Jackson, and involved no full discussion of the subject's place as a jurist. For these reasons, it seemed worth while to have this book written—the life of a Border State Federalist, written by one who was brought up in the town where Taney practiced law for nearly a quarter of a century, and who has lived for the whole of his adult life in the city which was Taney's residence during his judicial career. I have tried to write a biography, not a history of the times, and to portray the venerable Chief Justice as a consistent character, limited by his environment, compre-

hensible only when it is comprehended, and yet, because of the conjunctions of his nature and his opportunities, a notable figure in United States history, a high-minded, sincere, devout man.

Miss Eleanor M. Johnson, of Frederick, has kindly permitted the reproduction of the silhouette of Taney, made while he resided in that town, and J. Henry Baker, Esq., of Baltimore, has generously loaned the cut of the painting of Taney which belongs to Dickinson College. The author's thanks are due to John E. Semmes, Esq., and to Lawrence C. Wroth for courtesies shown during the preparation of the work.

During the printing of the book, "Judge Taney" has become a household word in our family. Should a formal dedication have seemed wise, it would have been made to the memory of the conversations held, concerning the preparation of this book, with my wife and sons.

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Cicero, "De Senectute," Cap. 3, 8: "Cato, Est istud quidem, Laeli, aliquid, sed nequaquam in isto sunt omnia. Ut Themistocles fertur Seriphio cuidam in iurgio respondisse, cum ille dixisset non eum sua, sed patriae gloria splendorem adsecutum. 'Nec hercule,' inquit, 'si ego Seriphius essem, nec tu si Athencensis, clarus unquam fuisses.' "

James Breck Perkins, in the preface to his "France under Richelieu and Mazarin," wrote: "Of the pleasure of being brought into close contact with the great figures of other times, of reading their thoughts and their purposes, of living for a while in intimate relations with a generation that has long passed away, sympathizing, as a contemporary might, with their adversity and their suffering, rejoicing in what gratified national pride or increased individual comfort."

W. Alexander, "Epistles of St. John" (Expositor's Bible) p. 85: "A great life, even as the world counts greatness, is an organic whole with an underlying vitalising idea; which must be construed as such, and cannot be adequately rendered by a mere narration of facts. Without this unifying principle, the facts will be not only incoherent, but inconsistent. There must be a point of view from which we can embrace the life as one. The great test here, as in act, is the formation of a living, consistent, unmutilated whole."

W. H. Dunn, "English Biography," p. XIV: A true biography is the narrative, from birth to death, of one man's life in its outward manifestations and inward workings. The aims of such a true biography, in its simplest form, would, therefore, include a record of facts, combined with some portrayal of character.

J. Dryden, Works (1821, Constable), XVII, 56: "As the sunbeams, united in a burning-glass to a point, have greater force, than when they are darted from plain superficies, so the virtues and actions of men, drawn together into a single story, strike upon our minds a stronger and more lively impression than the scattered relations of many men and many actions, and, by the same means that they give up pleasure, they afford us profit too."

Leslie Stephen, "Encyclopedia Britannica": "History is, of course, related to biography, inasmuch as most events are connected with some particular person . . . . . and, on the other hand, every individual life is, to some extent, an indication of the historical conditions of the time."

W. R. Thayer in "North American Review," June, 1920: "The master creations of fiction sprung from the human brain; the subjects of biography are the very creatures of God himself: the realities of God must forever transcend the fictions of man."

CHAPTER I

Early Life (1777–1796)

The broad Patuxent River, one of the tidal estuaries opening into the Chesapeake Bay, divides the southern portions of the Western Shore of Maryland. On the banks of this river colonists settled, who came from England to Maryland during the seventeenth century, and there they cultivated tobacco and raised some grain. St. Mary's County occupied the lower western and southern bank of this river. It was the first settled portion of the Province, and has always been inhabited by a people whose religion is predominantly Roman Catholic. The rolling, broken country to the north and east of the Patuxent River, forming a peninsula between River and Bay, was set off as Calvert County, within a generation of the settlement of the Province. This tract of land, named for the family of the Lord Proprietary, was inhabited by planters, whose holdings of land stretched along the water, which was the chief highway of the County, until a State Road was carried through it about 1914. The people were for the most part Protestants, but some families adhered to the Roman Catholic Church, and among these adherents was Michael Taney. His ancestors had come to the Province in the seventeenth century, and, for several generations, they had owned and cultivated a plantation on the Patuxent River at the mouth of Battle Creek. Roman Catholics were prohibited from teaching school in the Province during the latter part of the Colonial Period, and the planters of that faith, who could afford to do so, sent their children to France

to be educated. The Taneys lived comfortably on their "good landed estate," cultivated by the slaves they owned, and so Michael Taney was sent to the Jesuit College at St. Omer's and completed his education at Bruges. He returned to America, took possession of his estate at his father's death and married, about 1770, Monica Brooke, whose father's plantation was directly opposite the Taneys' on Battle Creek. The Brooke family had been prominent in the Province, from the time that Robert Brooke came in 1650 and "seated himself" on the Patuxent River, about twenty miles from the Bay. He was an Anglican, but some of his descendants became members of the Church of Rome, among them the branch to which Monica Brooke belonged. Robert Brooke's second son was named Roger and the latter had a son and grandson who bore the same name. The last of these was Monica Brooke's father. She was born in 1752 and was eighteen years of age when she was married.[1] The last Roger Brooke married twice, Monica being his seventh child, and the second one of his second wife, Elizabeth Boarman. Michael and Monica Taney had seven children, four sons and three daughters, of whom Roger Brooke Taney, born on the Battle Creek Plantation on March 17, 1777, and named for his maternal grandfather, was the third child and second son.

Of Michael Taney, we know nothing, except what Roger Taney's autobiography tells us of him and the tradition which states that he was a hot-tempered man, and, once in a quarrel, stabbed a man, who died

[1] For the Brooke family see Tyler "Life of Taney," pp. 21–26 and Dr. Christopher Johnston's article in 1 Md. Hist. Mag., 287. Tyler (ix) thought the name Taney was probably of Irish extraction. Taneytown in Carroll County, Md., is named for Raphael Taney, a relative of Roger B. Taney (See 2 Md. Hist. Mag. 74, article by G. S. Tawney).

from the wound.[2] He "lived to an advanced age,"[3] and made Roger Taney executor of his estate, which was a complicated one and was not finally settled until after the executor had become Chief Justice. The autobiography speaks with respect of the father, and shows that the two men were fond of one another.[4] We are told by the son that Michael Taney had "no taste for teaching and did not often assist" his children in their lessons, becoming "impatient," if they "did not learn as fast as he thought they should." "He was fond of reading and . . . . had read every work he could obtain in the then scant libraries of the country." A typical country gentleman, he "took pleasure in teaching his sons how to ride and swim and to fish and to row and sail in summer and to skate and to shoot ducks and geese in the winter." As a result of this instruction, Roger Taney wrote that he could not "remember when I could not ride on horseback and but faintly remember my first effort at swimming."[5]

Upon his mother, Taney lavished his affections. Most women in Maryland at that time, received a "very limited amount of human learning." "But," he wrote forty years after her death, "her judgment was sound and she had knowledge and qualities far higher and better than mere human learning can give. She was pious, gentle and affectionate, retiring and gentle in her tastes. I never in my life heard her say an angry or unkind word to any of her children or servants, nor speak ill of any one. When any of us. or the servants about the house who were under her im-

[2] See Hungerford's "Old Plantation" p. 300 and G. A. Townsend's story refuted in 67 Catholic World for June 1898, p. 396.

[3] Tyler, p. 27.

[4] Vide Tyler, pp. 36, 80, 94.

[5] Tyler, pp. 27, 28.

mediate control (all of whom were slaves), committed a fault, her reproof was gentle and affectionate. If any of the plantation-servants committed faults and were about to be punished, they came to her to intercede for them; and she never failed to use her influence in their behalf, nor did she ever hear of a case of distress within her reach that she did not endeavor to relieve it. I remember and feel the effect of her teaching to this hour."[6]

When the British fleet entered the Patuxent River in the expedition against Washington, it anchored opposite Michael Taney's house, where the stream was two miles broad.[7] About that time, Mrs. Taney left her home and took refuge with her son, Roger, who was then living in Frederick. A few months afterward, before the end of 1814, she died and was buried in the little graveyard of the Jesuit Novitiate in Frederick. When Taney removed from Frederick, he made an arrangement with a friend to have himself buried beside her, whenever and wherever he might die.[8] Fifty years after her death and when his own death was only a few months distant, he wrote to thank one who had removed the "moss and rubbish" from the flat stone placed over her grave.[9] In that letter, he referred to his expectation that he would soon "be laid by the side of my mother." This direction was carried out by Taney's family, and, when the graveyard was given up, at the time the Novitiate was taken from Frederick about the year 1900, the two bodies were removed to the Roman Catholic cemetery of the town, where they now lie side by side.

[6] Tyler, p. 26.
[7] Tyler, p. 20.
[8] Tyler, p. 143.
[9] May 6, 1864, to H. McAleer. Letter dated Washington. Tyler, p. 484.

The planters of Calvert County lived far from towns, and the Taney plantation was in a "retired situation." The Maryland Constitution of 1776 had placed all Christians upon "an equal footing," as far as education went; but it was difficult to find a school near the Taneys' plantation.[10] "The families which we visited by land," Taney wrote, "were several miles distant from us, and our chief social intercourse was in boats across the river or creek, with families who resided on the opposite shores."[11] At eight years of age, Roger Taney began going to the only school within ten miles—one "distant three miles, kept in a log cabin by a well disposed, but ignorant, old man, who professed to teach reading, writing, and arithmetic as far as the rule of three." The teacher was not religious, but was "a kind man, upright and conscientious." The "only school books were Dilworth's spelling book and the Bible." The latter volume was probably in the King James version, as the teacher professed to belong to the Episcopal Church, and "was used merely as a book to teach us how to spell words and pronounce them." The teacher eked out his living by cultivating a "few acres of poor land." To and from this school, Roger Taney, with his elder brother and sister, "walked every day, when the weather was good, and, when it was unfavorable, we stayed at home. Our attendance, therefore, was not very regular." About thirty scholars generally attended this school—"which was a large number, considering its retired situation and the sparse population about it."[12] A "barring out" of the master was the "only exciting event," which Taney remembered of his stay there.

[10] Tyler, p. 27.
[11] Tyler, p. 20.
[12] Tyler, p. 27–29.

When the two Taney boys had learned what this teacher could instruct them, they were sent to board with a Scotchman, named Hunter, who kept a grammar school in Calvert County, ten miles from the Taney plantation. "He had the reputation of being an accomplished classical scholar," and taught about twenty pupils. Roger Taney began to study Latin with him, but, after two or three months, the teacher became insane and the school[13] was broken up. Michael Taney then determined to employ a private tutor. This was a common practice in that time and place. It gave almost the only opportunity to have the daughters educated. "He planned to adopt the English notion of "perpetuating the family estate in the eldest son" and to give him the "landed estate," while providing the younger sons "with a liberal education and the means of studying a profession," upon which they must support themselves. By this plan, which, as Taney wrote, "proved an unfortunate one for my elder brother," Michael Taney "designed to give him nothing more than a good English education that would fit him for the business of a landed gentleman, cultivating his own estate, and qualify him to associate upon equal terms, as to education and information, with the gentlemen of the county." All this would be accomplished by a private tutor.

Roger Taney was about twelve years of age when the first tutor was engaged—"an Irishman, who died of consumption within a year." Taney believed that this tutor was "a ripe scholar." He was certainly an amiable and accomplished man in his disposition and manners. "The second tutor, whose term of service was a year, was a native of Maryland." He was a

[13] Tyler, p. 33.

good English scholar, but his "knowledge of Latin was very slender" and he "was altogether ignorant of Greek." The third and last tutor was David English, a graduate of Princeton, who afterwards edited a newspaper in Georgetown, D. C., and "was for many years employed as an officer in one of the banks of that place." He was "an accomplished scholar and seemed to take pleasure in teaching us and was altogether an agreeable inmate in the family." In 1854, Taney recalled with pleasure, English's "unwearied attention and kindness" and the "interest he took in my fortunes, as long as he lived."

After a year's instruction, English advised Michael Taney to send Roger at once to college, and encouraged him to do so by the very favorable accounts he gave of "the boy's progress."[14] Dickinson College, at Carlisle, Pennsylvania, was selected, because two young men, somewhat older than Roger Taney, with whose families Michael Taney was "intimately acquainted," were already students there and "gave very favorable accounts of the institution."[15] Thither, accordingly, Roger Taney went, just after he was fifteen years old, at the close of the spring vacation in 1792, in company with one of the students just referred to.

"It was no small undertaking, however, in that day, to get from the lower part of Calvert County to Carlisle. We embarked," says Taney, "on board one of the schooners employed in transporting produce and goods between the Patuxent River and Baltimore, and, owing to unfavorable winds, it was a week before we reached our port of destination; and, as there was no stage or any other public conveyance between Balti-

[14] Tyler, pp. 33–35.
[15] Tyler, p. 36.

more and Carlisle, we were obliged to stay at an inn, until we could find a wagon returning to Carlisle, and not too heavily laden to take our trunks and allow us occasionally to ride in it." The whole journey took about a fortnight. "And what made the journey more unpleasant," Taney continued, "was that we were obliged to take, in specie, money enough to pay our expenses until the next vacation. The money was necessarily placed in our trunks, and they were very much exposed in an open wagon in a public wagon-yard, while the wagoner and ourselves were somewhere else."[16]

Taney found his college life "taken altogether, a pleasant one." Dickinson College was not yet ten years old. The second institution of collegiate grade in the State of Pennsylvania, it had been incorporated in 1783 and was opened shortly afterwards with the Rev. Charles Nisbet, D.D., of Montrose, Scotland, as principal, an office he continued to hold until his death in 1804. He was a Presbyterian clergyman, and while the new college was not exclusively denominational, its tone was distinctively Presbyterian, until the institution was taken over by the Methodists in 1833. Dr. Nisbet was not only head of the College, but also occupied the pulpit of the Presbyterian Church at Carlisle, alternately with his colleague in the faculty, the Rev. Robert Davidson, D.D., a graduate of the University of Pennsylvania.[17] The college exercises were held in

[16] Tyler, p. 37.

[17] See the "Sketch of Dickinson College" by Professor Charles F. Himes in Haskins and Hull's "History of Higher Education in Pennsylvania," Contributions to American Educational History, edited by Herbert B. Adams, No. 33. Tyler (p. 99) had access to the notes which Taney took of Dr. Nisbet's lectures, and found them "very full and very accurate," in "bound manuscript volumes." "The notes on moral philosophy cover 248 closely written pages.

a two story building, which Taney described[18] as a "small and shabby one fronting on a dirty alley, but with a large open lot in the rear, where we often amused ourselves playing bandy." There was no dormitory, and the students boarded with families in the town. Taney's first boarding place is unknown; but, after six months, he resided in the house of James McCormick, the Professor of Mathematics. There were usually eight students boarding there, and Taney remembered that "Mr. McCormick and his wife were as kind to us, as if they had been our parents."

Taney's relations with Dr. Nisbet were very pleasant. A letter from Michael Taney to Dr. Nisbet asked him "to stand in the place of a guardian" to the boy, on account of his "youth and distance from home and friends and the retirement and seclusion" in which he "had so far been educated."[19] Dr. Nisbet was cordial and invited Taney to visit him often. The young student spent "many a pleasant evening" at his house, "enjoying and profiting by the elder man's conversation, which was cheerful and animated, full of anecdote and of classical allusions and seasoned with lively and playful wit." Mrs. Nisbet also took an interest in the youth and "never failed, when she had an opportunity, to give" him "a regular course of motherly instruction and advice," delivered in a "dialect so broadly Scotch" that "half of what she said" failed to be understood. Taney had a great respect for Dr. Nisbet as a teacher, but thought less highly of Dr. Davidson.[20] Taney and

Those on the dead languages and classical education, and the character of the principal classic authors, beginning with Homer and ending with Seneca, cover 112 pages. Those on criticism cover 296 pages, and those on logic, 178 pages." I have not found these volumes.

[18] Tyler, p. 38.

[19] Tyler, p. 38.

[20] Tyler, p. 42.

all the students were much attached to a fourth member of the faculty, Charles Huston, who taught Latin and Greek, and found him an accomplished scholar, "happy in his mode of instruction." In a friendly manner, he was willing to aid in his difficulties, a boy disposed to study. Taney entered the College not sufficiently advanced in his preparation to become a Junior, but with more than enough instruction to become a Sophomore. Professor Huston[21] saw that Taney and a classmate, who was in a like situation, "would be idle and unemployed for the greater part" of the time, if they "were held back and confined" to the Sophomore studies. Consequently, he proposed that the two boys be put in a class by themselves and be given an "opportunity, by close application, to overtake the Junior class, so as to be ready to enter with them the Senior year and to graduate with them. "Taney and John Lyon," the other youth, "gladly accepted his proposition;" both, "perhaps, flattered by the good opinion" of the teacher, and "anxious not to disappoint him." By hard study and helping one another, they gained on the class before them, and, as Taney proudly related, "when we were examined with them, preparatory to our admission to the Senior Class, we were, by no means, the worst scholars." During the whole course, Taney states; "I studied closely, was always well prepared in my lessons, and, while I gladly joined my companions, in their athletic sports and amusements, I yet found time to read a great deal beyond the books we were required to study. And as my course of reading was selected by myself and governed by the impulse or taste of the moment, it was rather desultory, and some of it not

[21] Tyler, p. 44. Huston in later life was a Judge of the Supreme Court of Pennsylvania.

wisely selected." Almost all of his time was spent at Carlisle. "The difficulties of the journey" were so great that Taney returned home but twice, and upon both occasions walked from Carlisle to Baltimore[22] with a "school-companion, performing the journey in a little over two days" and reaching "Owings Mills, within twelve miles of Baltimore, on the evening of the second day."

At Dickinson, as in all contemporary American colleges, there were two secret literary societies. Taney belonged to the Belles Lettres Society, and, when the Senior year was drawing to a close, was put forward by his friends in that Society as its candidate for the honor of the valedictory address, an honor conferred at Carlisle by ballot of the graduating class. The election was a close one; but, through the efforts of John Lyon, Taney secured the coveted honor.[23] The election had been "animated and exciting," but was "conducted with perfect good humor and kind feelings." Its result gratified Taney very much; but, "as most commonly happens to successful ambition in a wider world," he "soon found that success had brought with it troubles and anxieties to which" he "had before been a stranger." An oration had to be written, which might "attract attention and provoke criticism" from the audience; but first it was to be submitted to Dr. Nisbet, and Taney "feared he might find it all wrong," since Taney "was unaccustomed to composition." In the Belles Lettres Society, the "exercises had consisted in debating a question agreed on, or of delivering an oration selected from some speech and committed to memory, or in reciting passages from a poem or play." This

[22] Tyler, p. 37.
[23] Tyler, pp. 47–50.

experience had helped him but little. He wrote that "the manual labor of writing was always unpleasant to me; and, although some of the members of the Society, occasionally, wrote out their speeches and read them in the debates, and sometimes read an essay upon some subject selected by themselves, yet I never had done so. My speeches in the debate were always made from very brief notes, unintelligible and unmeaning to anybody but myself—consisting of the heads and order of the argument I intended to offer, each head containing only a few words, to recall to my memory the point I meant to urge. And when I sat down to write the valedictory oration, I had never written a paragraph of my own composition, except familiar and unstudied letters to my family." After expending much "trouble and anxiety" upon the oration, it was submitted to Dr. Nisbet and, to the writer's relief, it was returned "with only one or two verbal alterations."[24] The day for the public examination arrived,[25] an exercise attended by "most of the trustees, or visitors, who were in town and sometimes by other gentlemen of literary taste." Taney, with his classmates, about twenty in number, passed that ordeal, and then had a vacation of three or four weeks before Commencement Day. On that august occasion, the exercises were held in the Presbyterian Church,[26] in which a "large platform of unplaned plank had been erected in front of the pulpit." Taney gives us a vivid picture of his part in the ceremonies. "In front of him was a crowded audience of ladies and gentlemen; behind him, on the right, sat the professors and trustees in the

[24] Tyler, p. 51.
[25] Tyler, p. 46.
[26] Tyler, p. 53.

segment of the circle; and on the left, in like order, sat the graduates . . . . ; and in the pulpit, concealed from public view, sat some fellow-student, with the oration in his hand, to prompt the speaker, if his memory should fail him." Taney was "sadly frightened and trembled in every limb" and his "voice was husky and unmanageable." He was "much mortified" by this; and the "feeling of mortification made matters worse. Fortunately he continues, "my speech had been so well committed to memory, that I went through without the aid of the prompter."[27]

After graduation in the fall of 1795, Taney, then eighteen and a half years old, returned home and remained there during the following winter, "which was idly spent in the amusements of the country." Taney's father "kept a pack of hounds and was fond of fox hunting."[28] "It was the custom to invite some other gentleman, who also kept fox hounds, to come with his pack on a particular day and they hunted with the two packs united. Other gentlemen, who were known to be fond of the sport, were also invited, so as to make a party of eight or ten persons, and sometimes more. The hunting usually lasted a week. The party always rose before day, breakfasted most commonly on spare-ribs (or bacon) and hominy—drank pretty freely of eggnog, and then mounted and were in the cover, where they expected to find a fox before sunrise. The foxes in our county were mostly the red, and, of course, there was much hard riding over rough ground, and the chase was apt to be a long one. We rarely returned

[27] A letter from Taney to Rev. Dr. Wm. B. Sprague concerning one of his classmates is printed in the "Annals of the American Pulpit," Vol. IV, p. 188, and Tyler, p. 451.

[28] Tyler, p. 55.

home until late in the day; and the evening was spent in gay conversation on the events and mishaps of the day, and in arrangements for the hunt of the morrow, or in playing whist for moderate stakes. There was certainly nothing like drunkenness or gambling at these parties. I myself never played. By the end of the week, the hunters and dogs were pretty well tired, and the party separated. But before they parted, a time was always fixed when my father was to bring his dogs to his friend's house, or they were to meet by invitation at the house of some other gentleman of the party, where another week would be passed in like manner; and these meetings, with intervals of about a fortnight or three weeks, were kept up until the end of the season. I joined in all of them: and, when not so engaged, my father, with my elder brother and myself, hunted with his own dogs, when the weather was fit. . . . . I liked it and enjoyed it greatly. For although my health was not robust, and eggnog was very apt to give me a headache, yet, in the excitement of the morning, I forgot the fatigues of the preceding day, and rode as hard as anybody, and followed the hounds with as much eagerness." After a winter of this sort, however, Taney felt "tired of this idle life and impatient to begin the study of law," the profession his father decreed him to follow and which he himself preferred.

CHAPTER II

Law Student at Annapolis (1796–1798)

In the spring of 1796, Taney went to Annapolis to begin reading law in the office of Jeremiah Townley Chase, one of the Judges of the General Court.[1] "This Court had original jurisdiction in all civil cases throughout the State of Maryland, when the matter in dispute exceeded £1, in Maryland currency ($2.66\frac{2}{3}$), and in criminal cases of the higher grade. It sat twice a year in Annapolis for the Western Shore, and twice at Easton for the Eastern Shore; and jurors from every county of the respective Shores were summoned to attend it." County Courts took its place, when the General Court was abolished in 1805, having been continued until that time, "by the confidence the people entertained in the ability and impartiality of the tribunal." "The Court consisted of three judges, always selected from the eminent men of the bar; the jurors from each county were taken from the most respectable and intelligent class of society . . . . The extent of its jurisdiction and the importance of the cases tried in it, brought together, at its sessions, all that were eminent or distinguished at the bar on either of the Shores for which it was sitting." For these reasons, the Court was "continued so long," although it was "exceedingly inconvenient to the suitors in the distant counties to attend it, and the cost of bringing witnesses to Annapolis, and Easton, and keeping them there sometimes for weeks together, was oppressive and often ruinous to the parties."

[1] Tyler, p. 56.

To Annapolis, almost everybody came on horseback, except those coming from Baltimore, who often took boat, and the sessions at the State's capital were the more important ones, on account of the greater "population, extent of territory, and commercial character of the Western Shore." Because of the sessions of this court, Annapolis was considered the best place in Maryland, "where a man should study law, if he expected to attain eminence in his profession." Taney became one of twenty or thirty such students,[2] then reading law in various offices.

He plunged into the study of law with ambition and ardor, and, "for weeks together, read law twelve hours in the twenty-four." In the retrospect, he was "convinced that this was mistaken diligence" and that he would have profited more, if he had read "law four of five hours and spent some more hours in thinking it over and considering the principle it established and the cases to which it could be applied." He determined "not to go into society," until his studies were completed, and he "adhered to that determination." "In the midst of the highly polished and educated society, for which that city was at that time distinguished," Taney "never visited in any family and respectfully declined "the kind and hospitable invitations" he received, though he was only nineteen years of age, when he came to Annapolis. He associated only with the students, and studied closely. Here, again, in later years, Taney became satisfied "that it would have been much better for me, if I had occasionally mixed in the society of ladies and gentlemen older than the students. My thoughts would often have been more cheerful, and my mind refreshed for renewed study,

[2] Tyler, p. 58.

and I should have acquired more ease and self-possession, in conversation with men eminent for their talents and position, and learned from them many things which law books do not teach."

Reading law in the office of a judge, instead of in that of a practicing lawyer, gave Taney "more time for uninterrupted study;" but, on the whole, he felt that it had been a disadvantage to him, since there was "no instruction in the ordinary routine of practice, nor any information as to the forms and manner of pleading," further than "could be gathered from the books." "In the office of a lawyer," Taney wrote,[3] "the attention of the student is daily called to such matters, and he is employed in drawing declarations and pleas, general and special, until the usual forms become familiar to his mind, and he learns, by actual practice in the office, the cases in which they should be respectively used, and what averments are material, and what are not." He felt that the "want of this practical knowledge and experience" had been a "serious inconvenience." Because of this fact, "for some time after entering upon practice," he "did not venture to draw the most ordinary form of a declaration or pleas, without a precedent" before him. If a declaration for the plaintiff was needed, "varying in any degree from the ordinary money counts," or a "special plea" was necessary for the defence, he examined "the principles of pleading which applied to it, and endeavored to find a precedent for a case of precisely that character; nor was it so easy, in that day, for an inexperienced young lawyer to satisfy himself upon a question of special pleading." Printed forms were inadequate, the existing form books were incomplete and the great im-

[3] Tyler, p. 60.

portance of the adjective law was such that Taney forgets to tell us of any reading in the substantive law. "In that day, strict and nice technical pleading was the pride of the bar, and I might almost say of the Court," Taney adds. His success was so great, in learning pleading and practice, that we shall see him recognized by his colleagues as the expert in those subjects, among the Justices of the Supreme Court.

Taney became an intimate friend of William Carmichael, who had come from the Eastern Shore to read law in another office in Annapolis. The young men roomed together for a year, and every night discussed together, for "mutual information," the reading of the day. With some other students, Taney formed a debating society, but they rarely discussed legal questions. Their object was to prepare themselves for the bar, "by the practice of oral arguments" among themselves. There was no moot court, for the leaders of the Annapolis bar did not encourage the formation of one among the students. Instead of such a court, Judge Chase advised[4] Taney "to attend regularly the sittings of the General Court, to observe how the eminent men at the bar examined the witnesses and brought out their case, and raised and argued the questions of law, and afterwards to write a report of it for his own use." Taney followed his advice, and "reported a good many cases," but threw them into the fire, when he examined them after he had been admitted to the bar, being convinced by this examination, "that no one was fit to be a reporter, who was not an accomplished lawyer."

The first session of the General Court which Taney attended, made a strong impression upon him.[5] The

[4] Tyler, p. 62.

[5] Tyler, p. 64.

three Judges, wearing scarlet cloaks, sat in chairs placed on an elevated platform; and all the distinguished lawyers of Maryland were assembled at the bar. Taney was familiar "with their names and standing," for his "fox-hunting friends" in Calvert County "had been jurors to that Court, and had frequently talked to him about the great lawyers they had seen and heard at Annapolis." The young student gazed "with deep interest upon the array of talent and learning" and looked forward to the day, when he might "occupy the like position in the profession," receiving the emoluments the leading lawyers received, and holding the "high rank and social position, which were in that day" great inducements to "ambition for legal eminence." Luther Martin was then "the acknowledged and undisputed head of the profession" in Maryland.[6] William Pinkney was abroad. When he "returned from England and resumed the practice, the reign of Martin was at an end."[7] Over a half century later, Taney, having "heard almost all the great advocates of the United States, both of the past and present generation," wrote, that "I have seen none equal to Pinkney."

Three years passed[8] of close study in Judge Chase's office, and then Taney was admitted to the practise in the spring of 1799. His timidity made him fear that he should break down in his "first essay at the bar." He could not write out a speech, for he "could not know precisely what the evidence would be, nor what points might arise," and he knew that he "must be able to think and exercise the power of reasoning," while "he was speaking, and while he was conscious that every

[6] Tyler, pp. 65–69.
[7] Tyler, pp. 69–74.
[8] Tyler, p. 75.

one was looking" at him and listening to him. Therefore, a "very humble forum"—the Mayor's Court at Annapolis—was selected for Taney's "first effort." The Mayor was a "good natured, old gentleman," who "had never studied law," and Taney was quite sure that he "knew more law and had more capacity also, than the Mayor, or any of the aldermen who sat with him," to try "petty offences committed within the precincts of the city."[9] Gabriel Duvall, then a Judge of the General Court and afterwards a Judge of the Supreme Court of the United States, was the Recorder, but he did not regularly attend court, and Taney "had no suspicion that Judge Duvall," for whom the young lawyer "had the highest respect, would think it worth his while to preside at the trial" of the case of a man whom Taney was to defend and who had been "indicted for assault and battery, in which very little mischief had been done to either party." Before the Court and Jury whom he expected to appear, Taney thought that he could "speak without confusion," if he could ever do so. A fellow student, who had also just been admitted to the bar, was associated with Taney in the defence. Just as the jury had been empanelled and the young attorneys "felt quite brave and men of some consequence," to their "utter dismay, in walked Recorder Duvall, with his grave face and dignified deportment, and took his seat on the bench." Taney and his associate were both frightened, for they "had been accustomed to see him administering Justice in the General Court, and listening to the first lawyers of the State." They thought that he would contrast the efforts of the tyros with those of the leaders of the bar. They could not draw back, however, and found his

[9] Tyler, p. 76.

manner kind and encouraging. Taney remembered the case years later, as "a very good one for a speech. As almost always happens, when a fight takes place in an excited crowd, there was much contradictory testimony, and it was difficult to say whether our client committed the assault, or struck in self defence." Taney "watched the testimony carefully, as it was given in;" but took no notes, for his hand shook so that he "could not have written a word legibly," if his "life had depended on it." In his vivid recollection of the scene, he recalled that, "when I rose to speak, I was obliged to fold my arms over my breast, pressing them firmly against my body; and my knees trembled under me, so that I was obliged to press my limbs against the table before me, to keep me steady on my feet." Yet, "by a strong effort of the will," he "managed to keep possession of the reasoning faculties, and made pretty good argument in the case, but in a tremulous and somewhat discordant voice." The verdict was in favor of Taney's client, but this fact hardly consoled the young lawyer "for the timidity" he "had displayed and the want of physical firmness, which seemed" to him "to be little better than absolute cowardice."

Taney never quite became free of "this morbid sensibility,"[10] and, "in the first years of his practice," found it so painful that it might have led him to abandon the practice of the law, if he could have afforded to live without it. He tells us that "I never, for a moment, thought of engaging in any other pursuit. I knew that my father and family had formed high hopes of my future eminence and that a great deal of money had been spent on my education. So I determined,

[10] Tyler, p. 79.

from the first, to march forward in the path I had chosen, and, whatever it might cost me, to speak on every occasion, professional or political, when my duty required it." He added that a "firm and resolute will can do a great deal," yet he felt that, "upon many occasions throughout" his "professional career," this "morbid sensibility" had given him "deep pain and mortification." Throughout his long professional life, he "was never able entirely to conquer it." Taney diagnosed the "source of this misfortune," as his delicate health. His health had been infirm from his "earliest recollection," and his "system was put out of order by slight exposure." "The excitement and mental exertion of a Court which lasted two or three weeks" caused Taney to feel, at the end of it, that his "strength was impaired" and that he "needed repose." He never knew whether this "sensibility" would "harass" him or not, until he rose to speak. "Chiefly on account of the consciousness of his weakness," he "uniformly refused to make a Fourth of July address, or to speak upon any of those occasions where an orator of the day is a part of the ceremony." His recollection was, that: "Although I had been some years in the practice, when I made my first speech in the Court of Appeals of Maryland, and many more, when I first appeared in the Supreme Court of the United States, I felt it on each of these occasions nearly as much, as when I tried the case in the Mayor's Court. Even in the courts in which I was familiar, and where I had risen to the first rank of the profession and tried almost every case of any importance, I have sometimes felt it at the beginning of a term, although I had so mastered it that nobody perceived it but myself."

CHAPTER III

Lawyer in Calvert County and Member of the House of Delegates (1798–1801)

Shortly after his admission to the bar, Taney returned to Calvert County, as his father desired he should begin practice there, "attending also the Courts in the adjoining counties." Taney felt that "it was not a very desirable theatre for a lawyer, for the counties were small and the population agricultural, so that there were but few controversies of much moment, and a lawyer confined to those counties, even in full practice, could hope for little more than a mere support." Taney's father had, however, "ulterior objects," in wishing that his son should settle in Calvert. He had, frequently, sat in the House of Delegates at Annapolis, as a member from his county and "he looked upon distinction in the profession of the law as a stepping stone to political power." He believed that his son, on whose "capacity he placed high hopes," could more readily make his "way into public life from that part of the State, than from any other and might then select a more suitable theatre for the practice of the law." He proposed, therefore, that Roger Taney become a candidate for the House of Delegates,[1] and the latter was "sufficiently imbued with political ambition to be willing to go at once into political life." Furthermore, he was "not a little flattered at the idea of becoming"—at the age of twenty-two years—a member of that General Assembly, in whose membership he had seen every year "some of the most distinguished men of the

[1] Tyler, p. 81.

State" and to whose debates he had listened, while he was a law student at Annapolis.

He feared, however, that he could not be elected; for he had been "absent from the county, with short intervals," from his boyhood and was "personally known to very few of its inhabitants." The son was unwilling to begin his political career with a defeat, but the father thought there was no danger of that. The father's friends agreed with him, and so Roger Taney permitted his candidacy to be announced. He was a Federalist, to which party his "family and friends generally belonged;" but, at that period, "it was not thought expedient, or right in principle, to carry these party divisions and conflicts into the concerns of the State, and the election of the candidate depended on his personal weight and supposed fitness for the position and the influence of friends who took an interest in him." At the election of 1799, five candidates presented themselves in Calvert County, but only four members were to be chosen. At that period, the electors for the whole county came to vote, *viva voce*, at the Court House in the little hamlet of Prince Fredericktown in the center of the county. The area of the county is about 215 square miles, and the population was 8652 in 1790, nearly the same as now, for there has been little change in the number of inhabitants during the century and a quarter which have passed. About half of the population were negroes and the property qualification for voters had not yet been abolished, so that there were only a few hundred men who could exercise the elective franchise. The sheriff held the election, which lasted four days, at the end of which time he closed polls and proclaimed in a loud voice, the names of those who were chosen. During the time

that the polls were open, the candidates "sat on a raised bench, immediately behind the sheriff, so that each of them could see and be seen by every voter." Taney relates that: "When a voter came up, every candidate began to solicit his vote and press his own name upon him; and as many of the voters cared very little about the candidates, except the particular favorite he came to support, I think it very likely that the skilful in these struggles sometimes obtained votes that would otherwise have been given to another." Jests and rough and ready repartees abounded, but Taney "made no great figure in that part of the contest," because of lack of experience and of knowledge of the voters even by name. Fortunately for him, some of his friends often stood near and spoke for him. At the closing of the polls, Taney was one of those chosen in a close election. He felt that he owed his success to "the active and energetic support of a few personal and popular friends." The Court room was crowded to hear the result and Taney, "very modestly, returned thanks, in a brief speech," for the honor given him.[2] The speech "was received with loud hurrahs" and he "was, immediately, placed in a chair, raised upon the shoulders of the crowd, and marched in triumph about the courthouse green." The other successful candidates were also cheered, but Taney was the "only one accustomed to public speaking and the only one who made a speech."

The Session of the General Assembly, to which Taney was elected, began on Monday, November 5, 1799.[3] The House of Delegates was composed of four members from each of the nineteen counties into which

[2] Tyler, p. 83.

[3] William D. Carcaud, William D. Browne, and Walter Mackall were the other Delegates from Calvert County.

Maryland was divided and two each from the cities of Baltimore and Annapolis. Taney took a remarkably prominent position in the House, considering his youth and inexperience in public affairs. Instead of referring each bill to a standing committee, the practice then was to appoint special committees to bring in or report on bills. We find him appointed to serve upon many such committees and even named as chairman of some of them; for example, those upon superintending the revenue[4] and on coroners and sheriffs.[5] He served as member of committees, to bring in an insolvency bill,[6] to settle the rate of interest on open accounts,[7] to have the State relinquish its right to certain lots,[8] to compel the attendance of members,[9] to regulate constables' fees,[10] on a claim of Thomas Contee against the State,[11] on a lost certificate issued by the sheriff of Calvert County,[12] on an appropriation for Charlotte Hall Academy,[13] on the conference committee on the Governor's message,[14] on a Bank at Fell's Point in Baltimore City,[15] on a road in Talbot County,[16] on confiscated property,[17] on the State's stock in the Bank of England,[18] on a private road by Thomas Owings' grist and fulling

[4] December 13.
[5] January 2.
[6] November 6 and 14.
[7] November 8.
[8] November 12.
[9] November 12. On December 7 he voted to do this.
[10] November 14.
[11] November 15.
[12] November 16. He reported for this committee.
[13] November 19. He reported favorably for the committee on November 26.
[14] November 24. He reported an answer to the Senate on November 27.
[15] November 25.
[16] November 28.
[17] December 9.
[18] December 9.

mill, where he had rested on his way home from college some years before,[19] on a letter from the Governor of Virginia concerning a hospital,[20] on partition of estates of decedents,[21] on the better preservation of wills,[22] and on pensions to widows of Revolutionary soldiers.[23] He voted to abolish the property qualification for voters[24] and against the repeal of a *per diem* allowance for legislators,[25] holding that the repeal would tend to "exclude from the House all persons not possessed of affluent fortunes." He also voted against a State subscription to the Bank of Baltimore, and to establish an academy at Easton.[26]

The act of his which he remembered with most pleasure half a century later, was his support of "the law authorizing a canal between the Chesapeake and Delaware Bays"[27] which made a short route between Baltimore and Philadelphia. "This law was strongly opposed by the Baltimore interest," which feared diversion of trade from the City, "brought out a great deal of discussion and was carried through with much difficulty." Taney tells us that he "took an active part in favor of it" and that he felt that, before the session ended, he "was listened to with respect and attention," whenever he spoke.

While the Assembly met, General Washington died. The news reached Annapolis in the evening,[28] and, on

[19] December 10.
[20] December 13.
[21] December 13.
[22] December 16.
[23] December 23.
[24] November 12.
[25] November 19.
[26] December 27.
[27] Tyler, p. 84. November 27 and December 4.
[28] Tyler, p. 84.

the next morning, "immediately after the Houses were organized, the Senate sent down a message to the House of Delegates," by Charles Carroll of Carrollton and John Eager Howard, "proposing to pay appropriate honors." Over half a century later, Taney wrote, "I never witnessed a more impressive scene. The two honored Senators, with their grey locks, stood at the bar of the House, with the tears rolling down their cheeks. The Speaker and members rose to receive them, and stood, while the message was delivered. It was no empty, formal pageant. It was the outward sign of the grief within, and few were present who did not shed tears on the occasion. My eyes, I am sure, were not dry."

Early in January, the session ended and Taney returned home. In the retrospect, he felt that the experience "was, certainly, of much advantage to me in my future life." The discussions enabled him "to speak with less sense of embarrassment" and diminished his "morbid sensibility." He was also brought "into familiar association with the most distinguished men in the State, in debate and in the conduct of public affairs." Laying aside his "solitary habits," Taney had "mixed freely in the society of the place, which, at that period, was always gay during the session of the General Assembly and highly cultivated and refined." He was not always at ease in society, and his "defective vision," which rendered it difficult for him to recognize faces of persons he had not seen frequently, made him "feel awkward and uncomfortable, on entering a room." "This imperfect vision," Taney remarked with some melancholy, "is a most unfortunate infirmity for a man in public life, who must unavoidably become acquainted with a multitude of people,

whose good will he desires to preserve. And there is no readier way to lose it than to pass, without a sign of recognition, one to whom perhaps you were introduced the day before and familiarly conversed with." Taney feared that this defective eyesight had caused him to pass often without knowing them, men for whom he "entertained a real respect and regard." His eyes stood use well, so that in 1854 he wrote: "I can now read ordinary print, or write, by the light of a single candle; but I, sometimes, pass my own children on the street without knowing them, until they speak to me."[29]

After Taney's return from Annapolis, he passed some time "idly. There was very little professional business to occupy me," he wrote, as he recalled those days, "and I read very little law, and not a great deal of anything else. What I did read was chiefly *belles lettres*, or political and historical writings. I mixed but little in the society of the county, and returned again very much to my retired domestic life, spending my time with my own family. Indeed I have always loved the country and country scenes, too much to study, except in the long nights of winter. When the weather permitted, I was always out, wandering on the shore of the river, or in the woods, much of the time alone, occupied with my own meditations, or sitting, often for hours together, under the shade, and looking almost listlessly at the prospect before me. There was always a love of the romantic about me, and my thoughts and imaginings, when alone, were more frequently in that direction than in the real business of life."[30]

Whatever earnest work he did, was chiefly done with a view to familiarize himself with the "business of the

[29] Tyler, p. 87.
[30] Tyler, p. 87.

State," so as to qualify himself to take a leading part at the next session of the House of Delegates, to which he had high hopes of a reëlection. It was, however, the year of the Presidential election, and the question as to the method of choosing Presidential electors was one "upon which the whole State became agitated, and the election of the candidate in every county was supported, or opposed, according to his opinions on this question," instead of according to "his personal popularity." The Federalist leaders, probably instigated by Robert Goodloe Harper, who had recently removed to Maryland from South Carolina, advocated the choice of the electors by the Legislature, instead of by popular vote in districts, as the existing statute required. The Federalist leaders, as "always, too sanguine," wished for a vote by general ticket, believing that they could carry the State, but they could not secure such a law, for "the political power was in the hands of the counties." The agricultural population of the counties "were very jealous of the growing influence of Baltimore and, unwilling to give the commercial interest any increase of power, fearing it would be used in a manner that might prove injurious to the landed interest. And if a legislature composed of a majority of Federalists, had passed a law by which the majority in the counties might be overwhelmed by a sweeping majority in town, they would have been inevitably ruined in the counties, and lost all influence in the State Government." The only hope then to secure the vote of the whole State for John Adams was to have the matter "put to the people, as organized in the State Government, and not to the numerical majority."[31]

[31] Tyler, p. 88–92; see also Steiner's "Life of James McHenry," Chapter XVI.

This proposal was opposed by the Jeffersonians on the ground that it "took away the rights of the people," and some of Adams' supporters agreed with this view; but Taney "did not see the force of this objection," claiming that each voter, whether casting his "vote for the Electors, or for members of the Legislature, designated the person whom he wished to be President; and his share of the sovereign power was equally exercised, whether he accomplished his object by voting immediately for the President preferred, or appointing an agent, or several agents, to execute his wishes."

Taney was the only speaker among the Federalist candidates, and addressed three or four public meetings during the canvass. He was confident of success; but, to his surprise, in a close vote, three of the four Federalist candidates in the county, including himself, were defeated. The Federalists lost control of the Legislature, and the power of the State was found "in the hands of the Republican party" of Jefferson. Adams' unpopularity in Maryland contributed greatly to this result. The defeat greatly mortified Michael Taney and his son, and "put an end to any prospect of immediate political elevation" for the latter. He had never intended to reside permanently in Calvert County and felt that "there was no object to be gained by continuing there any longer." Neither father nor son wished that Roger Taney remain in Calvert for another year, as he wrote: "doing nothing to advance me in my profession, but wasting my time in small contests for county ascendancy." Where then, should he settle?[32] Father and son "had many consultations upon the subject." The father suggested Baltimore, but the son "had scarcely any personal acquaintances there"

[32] Tyler, p. 94.

and feared that, without them, he "should be lost in a large city." He then suggested Frederick, a town which, next to Annapolis and Baltimore, "was, with a view to profit, the best point of practice in the State." Then, too, one of the two leaders of that bar had recently retired from practice and the other, Arthur Shaaff, was removing to Annapolis. The remaining members of the Frederick bar were young, most of them being but a few years older than Taney. He had also formed friendships, when he was at Annapolis, with some young men who resided in Frederick and felt that he "should not there be as lonely and without friends" on his first arrival, as he would have been in Baltimore. Michael Taney yielded to his son's arguments, and, in March 1801, Roger Taney took up his residence in Frederick, and made his first speech in the Court there—a "volunteer speech," made at the invitation of Mr. Shaaff, who still practiced in Frederick, in one of his cases, in order to give Taney "an opportunity of appearing before the public."[33]

[33] Tyler, p. 95. It is with deep regret that we lose the assistance of Taney's precious autobiography at this point in his life—would he had written more of it!

Miss Eleanor Murdoch Johnson, of Frederick, possesses a letter written by Taney from Annapolis on July 2, 1799, in which he states:

"By the advice of Mr. Chase I qualified in the County Court and on the 19th of June, in the year of our Lord 1799, I commenced Attorney-at-Law. I made my *Maiden* speech on the Friday following, in defence of as great a scoundrel as ever lived, who was indicted for a felony. However, what he had done was only a private fraud, and not a felony in the eye of the law, so that I felt myself perfectly justifiable in defending him, as every man ought to be punished only according to the laws of his country. . . . . He was acquitted. Watts and I defended him. But the fellow was too poor to give us any fees."

In the letter which was addressed to William Potts, then living in Baltimore, Taney apologizes for not writing before, because he "was very much engaged during the whole of the General Court, in attending to the proceedings and taking notes on the points that were raised." He was undecided where to settle, but had "given up all thoughts of coming to Baltimore."

ROGER BROOKE TANEY

From a silhouette made in Frederick about 1820

CHAPTER IV

Law Practice at Frederick (1801–1823)

According to the census of 1790, the rich, agricultural country of Frederick, had a population of 30,791, and the town of the same name, which was the county seat, contained 2606 people. The county was larger geographically than at present, for it then contained the western half of the present Carroll County. Following the fertile valleys between the parallel ranges of the Appalachians, the Brunners, the Brengles, the Ramsburgs and Getzendanners, and many another immigrant from the Rhine Country had come into this area between 1730 and 1740, and had met there men like Thomas Schley and other Germans, who had come from Baltimore across Parr's Ridge by the old Frederick Road.[1] To Frederick also had come men of English stock, like the Thomases and Johnsons from Southern Maryland, like Potts and Sheredine. The county was set apart in 1748 and the town was laid out about 1745, and each took its name with a sort of squinting reference to the heir apparent, for Frederick, son of George II, was Prince of Wales, and the Prince's friend, Charles, Lord Baltimore, had named his son, Frederick, in his honor. There were some manufacturers; but, for the most part, the people were farmers, and the best of farmers. There were few negroes, except household slaves, and the farms were worked either by their owners, or by tenants who leased them on shares. The little "mountain city" lay in the valley of the Monocacy, which stretches from the Linganore

[1] Tyler, p. 95.

Hills to the Catoctin Mountain—a valley which already was smiling and "fair as the garden of the Lord."

The National Pike ran west from the town by Braddock's Spring, where the ill fated General's army camped for the night, down into the lovely Middletown, or Pleasant Valley, and then across the Blue Ridge, dipping down again into the valley of the Conocheague, passing the future battle field of Antietam on the left, and leading on to the county seat of Washington County, a town which its founder, Jonathan Hager, tried to call after his wife, Elizabeth; but which the people insisted should bear his name, and be known as Hagerstown. To the south of Frederick lay the tract of land known as Carrollton Manor—more often called The Manor, which belonged to the Carrolls, and from which the most famous of that family took his epithet. To the north, the road led past the village of Woodsboro', stretching along its one street, to Creagerstown, near which had been the first church of the German settlers on the Monocacy, and to Double Pipe Creek, near which stream stood the dwelling of John Ross Key.

His son, Francis Scott Key, had graduated at St. John's College in 1796, and, as a lawyer, had studied law with Taney at Annapolis, After a brief time spent at Frederick, he settled at Georgetown in the District of Columbia, and was building up for himself one of the largest practices before the Supreme Court of the United States. His reputation as a lawyer is forgotten, but his fine hymn beginning with the line, "Lord, with glowing heart I'd praise thee," is still in the hymnaries, and his authorship of the National Anthem has made his memory secure in the heart of every American. He had one sister, Ann Phoebe Charlton Key, and Taney's friendship for the brother led to his introduction into

the household, to his love for the sister, and to his marriage of her.

The little town of Frederick was the second in size in the whole State, being surpassed in population only by Baltimore, the commercial emporium. Its best known resident had been Governor Thomas Johnson, who had come from Southern Maryland, had become the first governor of the State, and had been the friend of Washington. He lived at Rose Hill about a mile from the town, and, as he was a native of Calvert County, and a friend of Taney's father,[2] the young lawer often went thither to consult with him on professional matters, and to talk of the men and events of the Revolution. Johnson had retired from practice, and could tell how he had nominated Washington in 1775, as Commander-in-Chief of the American forces, and how, as the first President of the United States, Washington had, in vain, endeavored to induce Johnson to accept the Secretaryship of State or a seat on the Bench of the Supreme Court. His niece was the wife of John Quincy Adams. The Hansons and the Thomases, who had intermarried, were as prominent as the Johnsons. John Hanson had been a delegate from Maryland to the Confederation Congress, and had served as its President in 1781. John Hanson Thomas, whose family also was a Southern Maryland one, was a patron of Taney in the early days. Nor must the Pottses be forgotten. Richard Potts, the head of the family, had sat at the Continental Congress, and had been a United States Senator, and his wife's position in the community was such that as late as 1870, the old negro women, in scornful contempt of the wife of a parvenu would say: "She must think she's Mrs. Dicky Potts."

[2] Tyler, p. 98.

Besides these families of English descent, stood the representatives of the early German settlers, such as Colonel Stephen Steiner, who was at this time, preparing to build the fine spire of the Evangelical Reformed Church, which is central of those "clustered spires of Frederick," standing "green walled by the hills of Maryland." Another representative of these families, Henry S. Geyer, was soon to emigrate to Missouri, destined to become United States Senator therefrom, and also to become counsel for the alleged master, in the great Dred Scott Case—so fateful in Taney's career. The major part of the townspeople were of German descent. Some few of them were children of Hessian soldiers who had surrendered with Burgoyne, had been confined in Frederick in the barracks they built on a hill to the south of the town, and had preferred to remain in America after the treaty of peace. Among the people of the town, was a quiet woman, one Barbara Fritchie, the wife of a glover. Neither she nor Taney ever had any idea that she would be the heroine of a famous poem, and that an act of patriotism attributed to her, would make her one of Frederick's notables.

In the town of Frederick, Taney lived and practiced law for nearly a quarter of a century. There, as a writer stated in 1838, he "showed that he possessed a mind of the highest order, that judgment, acuteness, penetration, capacious memory, accurate learning, steady perseverance in the discharge of duty, a lofty integrity, united with a grave and winning elocution."[3]

Mr. Justice Wayne, who had sat on the Supreme Bench with Taney throughout the whole of the latter's long judicial career, in his memorial address upon Taney in 1864, referred to the fact[4] that Taney's "general de-

[3] 4 So. Lit. Mess. (1838), p. 348.

[4] 2 Wallace X.

meanor, studious habits, and pure life gave him the good will and confidence of the people of Frederick." During the years of his residence there, he "made himself familiar with the history of the law in all its relations; for the organization of government, for the preservation of human rights, and also with those principles which had sprung from the instincts of men as to right and wrong, or which had been arbitrarily made, in ancient and later times, to rule the rights of property and the general conduct of persons in society, in connection with their obligations to authority. . . . . That course of reading and reflection familiarized him with the consideration of human rights, and strengthened his ability and disposition to maintain them. But he was no enthusiast. He thought that men had not been solely the victims of power, but of circumstances, in all times. . . . . He thought that God had designed for men rights, whatever might be the condition of their humanity, which could not be taken from them by fraud, by violence, or by avarice, with impunity from God's chastisement."

Taney's practice had become so well established, when he had been five years at the Frederick bar, that he was justified in marrying, and he wedded the sister of his friend, Francis Scott Key, at her father's home, on January 7, 1806. He had met her at Annapolis,[5] and "her beauty and bright mind and womanly graces won his heart." Tyler tells us that "the mansion where she was born was of brick, with center and wings and long porches. It was situated amidst a large lawn, shaded by trees and extensive terraced garden

[5] Tyler, p. 101. A portrait of Taney, painted by Emanuel Lentze for Mr. Campbell, and purchased by the sale of his effects by Mr. Etting, was offered for sale by Rosenbach of Philadelphia in 1917.

adorned with shrubbery and flowers. Nearby flowed Pipe Creek, through dense woods. A copious spring of pure water, where young people loved to retire and sit under the sheltering oaks in summer, was at the foot of the hill. A meadow of waving grass spread out toward the Catoctin Mountain, which could be seen at sunset, curtained in clouds of crimson and gold.[6] Taney was a Roman Catholic, while the Keys were devout members of the Protestant Episcopal Church, and so, according to the rule of the day, the children should follow the faith of the parent of their own sex. The only son of the marriage died young, and the six daughters were all brought up as Protestants.[7] Taney seems never to have tried to proselyte his family, and, when

[6] Key offered the place for sale in 1822. 13 Md. Hist. Mag. p. 129.

[7] McHenry Howard, Esq., in "Some Old English Letters," II 9 Md. Hist. Mag., p. 108, discusses the Key family. Mrs. Taney was four years younger than her brother, and was born June 13, 1783, and died September 29, 1855. Taney's children were: 1) Anne Arnold Key, born August 24, 1808, married James Mason Campbell, Esq., of Baltimore, on May 27, 1834, at Washington; 2) Elizabeth Maynadier, born April 8, 1810, married William Stevenson, a Baltimore merchant and had no children; 3) Ellen Mary, born August 29, 1813, died unmarried September 28, 1871; 4) Augustus Brooke, born September 15, 1815, died in infancy; 5) Sophia Brooke, born December 31, 1817, married Colonel Francis Taylor, U. S. A., and had one son, Roger Taney, who had no issue; 6) Maria Key, born February 19, 1819, married Major Richard T. Allison, U. S. A. and C. S. A., afterwards Clerk of the Superior Court of Baltimore City, and had no issue; 7) Alice Carroll, born June 25, 1827, died, unmarried, of yellow fever in September, 1855. Those who knew her long remembered her loveliness. Mrs. Campbell had a large family: 1) Phoebe Key, born June 23, 1836, married Rev. Augustus P. Stryker, and had two sons, Rev. Mason Campbell Stryker and Heber Halsey Stryker, of Hartford, Connecticut; 2) Mary Monica, born December 25, 1838, married Winfield Scott Anderson and had Rev. Roger Brooke Taney Anderson; 3) Alice Taney, born March 17, 1841, married Colonel Frank Marx Etting, U. S. A., and had no children; 4) Roger Brooke Taney, born June 3, 1843, died unmarried; 5) Anne Taney, born February 10, 1846, died unmarried; 6) Elizabeth Maynadier, born March 24, 1849, died unmarried; 7) Amy Mainwaring, born March 11, 1854, died unmarried. The above information has been obtained from Messrs. McHenry Howard and E. Glenn Perine.

a priest tried to urge the claims of the Roman Catholic Church at Taney's table, one day, he was promptly rebuked with the remark: "I never permit religion to be discussed at my table." On the other hand, Mrs. Taney did not object to her daughters attending service at the Roman Catholic Church, when they had been to worship at All Saints' Protestant Episcopal Church in the morning; but would frequently say, when the bell for vespers rang, and Taney prepared to leave the house in order to attend service: "Girls, which one of you will go to church tonight with your father?"

Taney himself was very devout and regular in the performance of religious duties, as he understood them, and, during his residence in Frederick, was to be seen every morning in the little chapel of the Jesuit novitiate. There he buried his mother,[8] and thither his own body was brought to be laid by her side. The body of Mrs. Taney, however, as she died a Protestant, could not be interred beside her husband's, in ground consecrated by the rites of his church, and so he laid it beside those of her relatives, in the beautiful Mt. Olivet Cemetery, at the other end of the town.

Shortly before his death, Taney wrote a cousin, Ethelbert Taney, "the only one left of the name from whom" he ever received a letter, and said that, in looking forward toward the close of life,[9] "most thankful I am, that the reading, reflection, studies, and experiences of a long life have strengthened and confirmed my faith in the Catholic Church, which has never ceased to teach her children how they should live and how they should die."

[8] Tyler, p. 143.
[9] Tyler, p. 475.

Tyler, who was both an intimate friend and a Protestant, states that Taney never obtruded "his religious doctrines upon any one. He often talked to me, in incidental conversations, on the general subject of religion; but the mantle of his charity was as broad as the sinning world." Just before Taney left Frederick, in September, 1822, the Rev. John McElroy took charge of the Roman Catholic Church there, and, in 1871, when over ninety years of age, he wrote Tyler, at the latter's solicitation, "concerning Judge Taney's practical religion"[10] "that his well known humility made the practice of confession easy to him. Often have I seen him stand at the outer door leading to the confessional, in a crowd of penitents, a majority colored, awaiting his *turn* for admission. I proposed to introduce him by another door to my confessional, but he would not accept of any deviation from the established custom."[11]

Mr. Justice Daniel told Tyler[12] that, at one time, "while all the judges were boarding at the same house in Washington, and before the hour for going up to the Court" he opened the door of Taney's room, and "found him on his knees at prayer." Daniel "withdrew instantly, much mortified that he had forgotten to rap before he entered the room," and, when he apologized for the intrusion, Taney replied that "It was his custom, before he began the duties of the day, to seek divine guidance through prayer." Tyler added that Taney's "religion was the moving principle of his life."

[10] Tyler, p. 476.

[11] Father McElroy added that, "in Washington, he continued to practice all the duties prescribed by the Catholic Church."

[12] Tyler, p. 477.

In November, 1803, the legislature of Maryland authorized Taney and six other men to superintend a lottery to raise $3600 with which to complete the beautiful Roman Catholic Church in Frederick. The managers gave bond in the following February, delivered the prizes to the "fortunate adventurers" within six months, and "applied the proceeds to the completion of the church within two years."[13]

Except for the subject of religion, Taney and his wife were not divided, and his love for her was lifelong and tender. His friendship for his brother-in-law was close, and, for years, the two families met annually at the Key homestead[14] to enjoy a family reunion, and to close each day with family prayers, the negroes being summoned to meet with the family, while the exercises were conducted by Francis Scott Key,[15] or by his mother, when he was absent. Tyler tells us that[16] "no man was ever more happily married than Mr. Taney. And the happy circumstances of this period shed a benign influence over his studious and contemplative life, and nurtured that bland suavity of manner which distinguished him, while they made the home-circle the sphere of his happiness."

[13] Edward S. Delaplaine, "Chief Justice Roger B. Taney—His career at the Frederick Bar," in 13 Md. Hist. Mag. 109 at p. 127, reprinted in Am. Law Rev. for July–August, 1918. In August, 1917, I suggested to Mr. Delaplaine, a talented young member of the Frederick Bar, who has served his county with credit for two terms in the House of Delegates, that he take up this subject, which he has handled thoroughly, and, by his treatment of it, has placed every student of Taney's life under obligations.

[14] Tyler, p. 101.

[15] Taney's friendship for Key was lifelong, and was shown by such acts as the trip which Taney took in 1814 to Georgetown, where Key resided, to try to persuade Key's family to stay with him, or with Key's father in the country, until the danger from the British invasion should be past (Preface to Key's Poems).

[16] Tyler, p. 102.

He was fond of society, and, on Independence Day, was wont to dine with a group of friends, under[16] the beech trees on the banks of the Monocacy, some two miles from Frederick.[17] A good horseman, he took pleasure in the excursions made necessary, when he accompanied juries to try cases upon view of the land involved, and the memory of the loveliness of the Catoctin Mountain, seen when he was upon such expeditions, remained ever with him. Mrs. Taney participated in this love of nature, and both of them greatly enjoyed the visits they paid with their children to her bachelor cousin, Arthur Shaaff, the lawyer, at his country seat, Arcadia, a few miles from Frederick. Both the husband and wife were "passionately fond of flowers," and Taney "always thought well of one who liked them."[18] In a letter from Washington to his wife on April 1, 1850, he mentioned that he found "the hyacinths in bloom in the Capitol grounds and walked about them alone, after the Court adjourned, to enjoy the marks of the opening spring."

After Taney's death, the Rev. Dr. Clover, an Episcopal clergyman, paid Mrs. Taney this tribute:[19] "Mrs. Taney was a woman of a noble and cultivated mind, of deep religious convictions, and of a truly catholic spirit. Courted by the influential, the affluent, and the fashionable, she cast aside the pleasures and attractions of the world, that she might the more fully and freely devote her life to the Saviour. From many an abode of virtuous poverty in the City of Baltimore, the prayer of gratitude has gone up in her behalf to heaven. One of the most unselfish women I have ever known, her life was a beautiful exemplification,

[17] Tyler, p. 103.

[18] Jas. Mason Campbell to Tyler, November 4, 1864. Tyler, p. 470.

[19] Tyler, p. 469.

not only of active benevolence, but of that spirit of true charity so admirably depicted by the Apostle Paul." William Schley, who had known her from his childhood, also bore testimony[20] to her being "emphatically the friend of the poor—a kind neighbor, a true friend, and an exemplary Christian."

Tyler tells us that[21] "The Chief Justice and Mrs. Taney seemed to be made for each other. The two made their home all but perfect in parental love and filial piety." He had been an intimate friend of the family and had been given to read the letters from Taney to his wife, through a period of nearly fifty years. These letters enabled Tyler to write with the greater confidence of the "singular purity and felicity of the private life which these letters reveal."[22] She "was a woman of high intelligence as well as cultivation," and so was in every way a fit mate for her husband.

In the letter we have already quoted, Taney wrote with tender solicitude,[23] "Having just left you all, my room is lonely and sad today, and I feel much more disposed to lie down and think of you all at home than do anything else. This bright weather will, I hope, continue, and enable you to exercise and be more in the open air. How glad I should be to walk with you."

Nearly two years later, he wrote her, on January 7, 1852, a letter so charming as to deserve quotation in full:[24]

I cannot, my dearest wife, suffer the 7th. of January to pass without renewing to you the pledges of love which I made to you on the 7th. of January, forty-six years ago. And, although I

[20] Proceedings of Baltimore Bar in honor of Taney, October 14, 1864.
[21] Tyler, p. 470.
[22] Tyler, p. 472.
[23] Tyler, p. 471.
[24] Tyler, p. 316.

am sensible that, in that long period, I have done many things that I ought not to have done, and have left undone many things which I ought to have done, yet in constant affection to you I have never wavered—never being insensible how much I owe to you—and now pledge you again a love as true and sincere, as that I offered you on the 7th. of January, 1806, and shall ever be your affectionate husband.

R. B. TANEY.

In September, 1855, while Taney was spending the summer at Old Point Comfort, where he had begun his autobiography, both Mrs. Taney and an unmarried daughter, Alice, sickened with yellow fever and died.[25] A few days afterwards, Father McElroy[26] called on him in Baltimore. In his visitor's words: "He was very much crushed and broken in spirits, after such a severe bereavement, as might be expected. He received me, however, with his usual kindness and courtesy. During my visit, a gentleman, with his carriage, sent to let Mr. Taney know that he came expressly to give him a little airing in a drive to the country for an hour or two. He sent for answer that he must decline his kind offer; and, then turning to me, he said: 'The truth is, Father, that I have resolved that my first visit should be to the Cathedral, to invoke strength and Grace from God, to be resigned to his holy will, by approaching the altar and receiving holy communion—preceded of course by confession.' "

A year later, Taney wrote[27] to his cousin, Ethelbert Taney, who was a farmer living near Hancock, Maryland, to thank him for a letter of sympathy and said:

I have indeed passed through most painful scenes, and have not yet gained sufficient composure to attend to business. But

[25] Tyler, p. 474.
[26] Tyler, p. 477.
[27] October 22, 1855. Tyler, p. 473.

it has pleased God mercifully to support me through this visitation, and to recall my bewildered thoughts and enable me to feel this chastisement comes from him and that it is my duty to submit to it with calmness and resignation. And I do not doubt that, severe as the trial is to those who survive it, it is, in the mysterious ways of Providence, introduced in justice and mercy to the living and the dead. . . . . My age and my feeble health put it out of my power to accept your kind invitation to visit you. . . . . My health has suffered from this shock and, at my time of life, I can hardly hope that it will be much better. My great duty is to prepare myself for that change which soon must come; and I trust that I shall mercifully be enabled to do so.

Taney's mother left her home during the War of 1812, to avoid danger from British incursions, and made her home with her son, until her death in the latter part of 1814.[28] The War of 1812 had another association with Taney, in the immortal verses written by Francis Scott Key, of which Taney's account, printed in the volume of collected poems by his brother-in-law, gives the most authentic account.[29]

Taney's father outlived his mother, and about 1819,[30] in a quarrel, stabbed and killed a neighbor, John Magruder. The old gentleman was indicted for manslaughter, but fled to Virginia, where he lived in seclusion, in Loudon County for several years, until he was killed by a fall from a horse. Two faithful slaves had accompanied him across the Potomac, and they brought his body home for burial in the family graveyard. The tradition of the neighborhood says that Magruder's brother disinterred the remains, and, when he had

[28] Tyler, p. 143.

[29] Reprinted in Tyler, pp. 109–119. Taney wrote that he felt a "melancholy pleasure in recalling events connected" with the "life of one with whom I was so long and so closely united in friendship and affection, and whom I so much admired for his brilliant genius and loved for his many virtues."

[30] 13 Md. Hist. Mag. 130.

opened the coffin, and assured himself that it contained the body of Michael Taney, in his fiendish rage, he battered the face with a stone.

In the life of the little town of Frederick, Taney took a prominent part. In 1818, he was named as one of the first Board of Directors of the newly chartered Frederick County Bank, and he rarely missed a meeting, during the several years in which he served as Director. On October 30, 1802, he was appointed a visitor of the Frederick Academy, and continued to serve as a member of the Board, until his resignation on February 1, 1822, during which period of twenty years, he was absent from only one or two meetings of the Visitors.[31] During his term as Visitor, his successor as Chief Justice, Salmon P. Chase, then a young New England College graduate, applied for the Principalship, and failing to obtain the desired position, went to Ohio, with results known to all.

One of Taney's intimate friends during this period, was Virgil Maxey of Anne Arundel County. Two of Taney's letters to him are preserved in the New York Public Library. One of these letters, without a date, speaks of an illness from which the writer was recovering and of a hoped for visit later. In the other letter, written on October 21, 1822, Taney speaks of the great anxiety felt at Frederick, because of many ill people. Taney was better, "yet, from my window, I can see the faded leaves falling from the trees, and have no reason to suppose that my hold of life is much firmer than these."[32] Taney's melancholy prognostications

[31] Tyler, p. 103.

[32] He inquired concerning Mrs. Maxey's health, transmitted Mrs. Taney's message of love to her and Mrs. Galloway, and spoke of the calamity experienced through the recent death of John Eager Howard, who "was greatly esteemed and respected."

were far from correct, for he had over forty years of life before him.

To young lawyers, Taney was especially helpful.[33] William Schley, born in Frederick, and in his mature life, a prominent lawyer in Baltimore, in his remarks made at the memorial meeting of the Bar, after Taney's death, spoke of having known him from early childhood: "As a boy, as a youth,[34] and, afterwards, as a student of law, I heard him very often in cases of magnitude in the Court of Frederick, and his arguments and his manner made a deep impression upon me. He sought no aid from rules of rhetoric, none from the supposed graces of elocution. I do not remember to have heard him at any time, make a single quotation from any of the poets. Yet his language was always chaste and classical, and his eloquence undoubtedly was great—sometimes persuasive and gentle, sometimes impetuous and overwhelming. He spoke, when excited, from the feelings of his heart, and, as his heart was right, he spoke with prodigious effect. And yet, perhaps above all other attributes, his exalted private character gave him with the honest, right minded juries of Frederick County, an extent of success which even his great abilities as an advocate would not have enabled him otherwise to secure. He had acquired, and he ever retained it, in an eminent degree, the confidence and respect of that community. The people knew that he was sincere and honest; they knew that he was a composer of strifes and controversies, whenever the opportunity was afforded, and that he never promoted any; and they also knew that, whilst he was was earnest, strenuous, and indefatigable in his efforts

[33] Vide James Dixon's letter. Tyler, p. 251.

[34] Tyler, p. 139.

to secure for his clients their full rights, yet he never sought to gain from the other party any unjust advantage. He was an open and fair practitioner. He never entrapped the opposing counsel by any of the manoeuvres of an artful attorney; and he contemned, above all things, the low tricks of the pettifogger. In taking exception to the adverse rulings of the Court, he never cloaked a point, but presented it fairly and distinctly for the adjudication of the Court."

Tyler[35] refers to several incidents illustrating his characteristic friendship for young lawyers. For example, William Ross had recently become admitted to the Frederick Bar, having settled in the town in 1805. He was employed in an ejectment suit in which Taney was the opposing counsel. The case stood next in trial and the Court asked if Ross was ready. He answered "Yes," but Taney whispered to him "that his locations were all wrong; and that, if he went to trial, he must lose his case, whether the right were with him, or not. Thereupon Mr. Ross had his case continued," and he never forgot this courtesy. So, when Joseph M. Palmer came from Connecticut to practice law in Frederick, in 1817, a client of Taney's mentioned to him his case and reported to Taney the opinion the "Yankee lawyer" expressed as to it. "Mr. Taney saw the force of Mr. Palmer's view, which differed from the one he held, and, at once, sent for Mr. Palmer and employed him in the case, to help him forward in his profession." Again, Mr. William Price, who had been engaged often as junior counsel to Taney, thus spoke of him: "But few men of his eminence have ever displayed so much kindness to the younger members of the profession. Often have I left his rooms after

[35] Tyler, pp. 137–139.

midnight, having gone through the authorities and settled the points to be made at the trial, and always believed that I was a better lawyer for the interview; for he never kept back from his young associate a single thought that occurred to his mind during the investigations. In a case of difficulty, he would tarry to explain the law and usually made it so plain that no man could well fail to understand it. After our labors were finished, he would invite me to remain and to talk with him, for, although his dignity was a part of his nature, yet he was one of the most genial persons I ever knew."

It is not known where Taney resided when he first came to Frederick. His name first appears on the County Land Records in 1813, in connection with those of Arthur Shaaff and Francis Scott Key, as one of the trustees, under the will of General James Lingan of Montgomery County, a Revolutionary veteran, and an ardent Federalist, who was murdered in the Baltimore Riots of 1812.[36] For most of the Frederick portion of Taney's life, he and his family occupied a small frame house still standing on Bentz street, at the southwestern edge of the town. This property, a modest home, for a successful lawyer, he bought for $3200, in June 1813, and sold it for $1500, when he left Frederick.[37]

Mr. Justice Wayne, in his eulogy of Taney,[38] said that he freed his inherited slaves, "aided them in their employments, and took care of them, when they were in want. He often said that they were grateful and they had never caused him a moment's regret for what he had done."

[36] 13 Md. Hist. Mag., p. 130.

[37] A lot on Church Street was the only other land he owned in Frederick, while living there, 13 Md. Hist. Mag., p. 130.

[38] 2 Wallace X.

On November 29, 1817, a free negro bound himself as a slave to Taney and to Frederick A. Schley, who was reading law in Taney's office, "upon the consideration that they would shelter and feed him, with the provision that, if the negro paid" a note to Woodward Evitt for $350, for which note Taney and Schley were securities, the indenture should be void. On the same day, Evitt sold Taney and Schley the negro's wife for $350, and they later manumitted her. It is an interesting transaction, showing Taney's desire to keep man and wife together, and to help a man buy his wife's liberty.[39] In 1805, Taney was taxed as owner of a female slave—probably his cook—and two others (doubtless her children) under the age of fourteen years. In 1818, he set seven negroes free, and, subsequently, together with his brother, Octavius Taney, he liberated two slaves, who had been owned by his father. Still later, in 1821, he manumitted another slave.

Taney did not leave his love for politics, nor his devotion to Federalism behind him, when he removed to Frederick County. In 1803,[40] he became a candidate, together with John Hanson Thomas and two others, on the Federalist ticket for the House of Delegates. The election was the first one in Maryland at which ballots were used, and was also the first one after the abolition of the property qualification for the suffrage, and the disfranchisement of the few negroes who had voted by virtue of their ownership of property, since, by a Constitutional Amendment, race had been substituted for property as the qualification for suffrage. Only the Sheriff, members of the House of Delegates,

[39] 13 Md. Hist. Mag., p. 131.

[40] Tyler, p. 100; 13 Md. Hist. Mag., p. 123.

and Electors for the State Senate were voted for at that time. Frederick County had a Jeffersonian Republican majority of voters, and Taney was defeated, but he canvassed the county vigorously, and his speeches made a deep impression. The campaign was one of barbecues. Taney and another Federalist candidate—nicknamed as "Little Sancho"—were permitted to engage in joint debate at the Republican barbecue in Middletown, at which 600 people partook of meat, bread, and whiskey, and at the one at Westminster, where 1000 people (including 100 women), were present. Taney marched into Frederick at the head of a cavalcade from a Federalist barbecue. The campaign degenerated into an appeal to prejudice against the Federalist "aristocrats," on the part of the Republican "plain people." The "Republicans' Advocate" attacked Taney as having been "fairly laughed out of Calvert County as an aristocrat," and alleged that he "ranted and was incoherent" in his speeches." Mr. Taney, it said, "owes it to the people of this county to give some account of himself, before he goes spouting—before he accuses others, let him tell the people who he is. What do the people of Frederick County know of Roger B. Taney? Why does he not tell the people how Dr. Kent saved him?"[41] The Republicans also attacked Charles Carroll of Carrollton, "that hoary headed aristocrat," who had "gone down to the Manor, no doubt with a view to influence the tenants on the place. Shall the people be dictated to by this lordly nabob, because he has more pelf than some others?"[42]

In 1808, together with David Lynn of Allegany County, Taney became a candidate for Presidential

[41] I cannot explain this allusion.

[42] The total vote cast was 4,841, and Taney polled 2,120.

Elector from the Western Maryland district, for the State did not then choose electors on a general ticket. They were defeated by Dr. John Tyler of Frederick, and Nathaniel Rochester (the founder of the New York City named for him) of Hagerstown, but the Republican majority in Frederick County was reduced to 30.[43] The Federalist candidates for the House of Delegates, including John Hanson Thomas, carried the County.[44]

The War of 1812 led to a split in the Federal party in Frederick County, and to a break in the friendship of Taney with John Hanson Thomas. The broken friendship was not renewed, until Thomas lay on his deathbed and, as he and his family had been of essential service to Taney on his first settlement in Frederick, the charge of ingratitude was long urged against him.[45] Taney gave his support to the national government, as soon as war was declared, and many other Federalists in Frederick County did the same. For some reason, these men were nicknamed *Coodies*, and Taney, because of his influence over them, was called King Coody. Thomas led the wing of the party which refused to support President Madison. While the division in the party was at its height,[46] Taney was nominated by his friends for a seat in the House of Representatives, and, notwithstanding the great strength of the Republican party in the district, was defeated in the Congressional election by only 300 majority.

In May 1815, John Hanson Thomas died.[47] Shortly before his death, "memories of their early friendship and the great qualities of Mr. Taney, came before his

[43] The figures were 2,471 and 2,341.
[44] 13 Md. Hist. Mag., p. 125.
[45] 13 Md. Hist. Mag., p. 126; Tyler, p. 106.
[46] Tyler, p. 119.
[47] Tyler, p. 107.

magnanimous soul," and he sent for Taney, "who hastened to the bedside of his rival, and gave him a greeting, so generous and so tender, that their reconciliation was consecrated by mutual tears."

In the next year, 1816, Taney was chosen an Elector for the Senate of Maryland from Frederick County. Each of the nineteen counties chose two members of this college, and the cities of Baltimore and Annapolis each chose one. The forty members of the College selected, from their own number or not, as they pleased, 15 Senators to serve for five years.

The Electoral College convened on September 6, chose Taney as chairman of its committee on credentials,[48] and, subsequently, elected him as Senator, by a vote of 28 to 12. Though he preferred professional life, he yielded to the desire of his friends, and, in after life, "always talked of his service in" the Senate "with singular pleasure." The Senate's session began on December 4, and, two days later, Taney appeared at its meetings. He was one of the tellers of the vote for Governor's council, and for the United States Senator, and, on January 2, after the Christmas recess, reported resolves condemning Congressional Presidential Caucuses.[49]

[48] Tyler, p. 120. Vide Van Santvoord's "Lives of the Chief Justices," p. 539. Van Santvoord speaks of Taney's "habitual reluctance to speak of himself or of his acts," and of his looking back on his service "in the Senate with more satisfaction and pleasure than to any other" one.

[49] On January 18 he served on a committee upon a hospital and on January 29 voted to remove Judge Zebulon Hollingsworth for intemperate habits and failure to give attendance on the Bench. He was excused from voting on January 31 on an act for quieting possessions, and enrolling conveyances, on the ground that he had been consulted as to the law before his election. He offered resolves against altering roads without notice, and voted for popular election of Senators, for the suppression of duelling, and for the incorporation of the Potomac Company. He opposed charters for the Specie Bank of Leonardtown,

On December 5, 1817, Taney introduced a bill to regulate clerk's fees in chancery proceedings, and also one to prevent the circulation of bank notes of a value less than a dollar. In the latter measure, appeared the same love for hard money which he showed later in national affairs.[50]

The session of December 1818,[51] saw Taney chairman of Committees which introduced bills to prevent the passage of bank notes below their nominal value, to regulate the manner of obtaining and altering roads, to regulate the admission of attorneys, and to relieve Phoebe Cresap.[52]

He did not come to the session of December, 1819, until January 17, 1820.[53] Two days later, he voted

the Dorchester Bank, and the Warren Manufacturing Company, as well as a constitutional amendment as to the attorney generalship. He was excused from voting on the bill to incorporate the Moravian Church at Graceham in Frederick County and on the proposal to pay money to the widow of J. H. Stone.

[50] He was chairman of a committee upon such a bill on January 30, 1821.

[51] On January 22 he voted for bills to grant charters to the Bank of Dorchester and the Frederick County Bank, and to regulate the manner of opening and altering roads, and he introduced a bill to have the Western Boundary of the State settled. He voted for a constitutional amendment as to the election of Governor on January 26, for a bill to incorporate the Grand Lodge of Masons on February 2, and for another bill to regulate lotteries for a hospital on February 10 and 16; but he opposed the incorporation of the turnpike in Montgomery, Frederick and Washington Counties, and of an academy at Libertytown, as well as the establishment of a Branch Loan office for the Eastern Shore on February 11. He voted against an insolvency bill and one concerning attachments. He served as Chairman of a conference committee upon a State loan, and reported a bill to incorporate the Washington and Baltimore Coal Company.

[52] January 14.

[53] He introduced a bill to incorporate an academy at Libertytown in Frederick County, and took an active part in the debate on a bill to regulate the incorporation of banks. On February 6, he voted against incorporating a bank at Oldtown. He favored the bill for the Maryland Hospital, and for the benefit of the Baltimore Roman Catholic Congregation. He voted for

against a resolution stating that the powers of Congress are derived immediately from the people, and not the States in their corporate capacity, therefore, that the members of Congress from Maryland should not be instructed by the Maryland legislature upon the proposed Missouri compromise. He also voted against a resolution, stating that the members of Congress should use their utmost endeavor to prevent the prohibition of slavery from being required of Missouri as a condition of admission. It is curious that Taney, who decreed the Missouri Compromise to be unconstitutional, should have voted on certain features of the measure, while it was pending, and it is also interesting that these votes were reported to Henry Clay and that the knowledge was used by him in an attack upon Taney in the United States Senate.

His last session was that of December, 1820.[54] He then showed his interest in insolvent imprisoned debtors, for such imprisonment had not as yet been abolished in Maryland. He was absent much of the time during this session.[55] When present, he voted not to repeal the law prohibiting the importation of slaves into the

the Surgical Institute Lottery on February 18. He served on the joint committee to examine records in the land office, and voted, on February 6, for a bill to alter the method of electing the Senate, but against a bill amending the act to direct descents, against incorporating a company for a bridge over the Nanticoke River, against an Annapolis street bill, and against an act relating to negroes.

[54] He voted against incorporating the Lodge of Masons in Salisbury on January 28, against a resolve for a medical college, and against amendments to the testamentary law. He was interested in the attempt which Maryland was vainly making to secure a portion of the National public lands for educational purposes. On January 30, 1821, he again showed interest in that subject. He was also interested in a bill concerning executions, favored the prohibition of cockfighting and gaming, and the grant of a lottery for the University of Maryland. (So again on February 18, 1821.)

[55] He arrived on December 11.

State. Bills[56] met his favor concerning habitual drunkards[57] and to discourage drunkenness by preventing the recovery of small debts contracted to pay for ardent spirits.

This term of service ended Taney's legislative career. His Senatorial achievement was creditable, but not distinguished, nor did it fulfil the promise of his term as Delegate. One can hardly help feeling that his mind was not greatly occupied with legislative matters, but was probably largely occupied by legal ones.

We have left the discussion of Taney's legal career, while practising at the Frederick bar, until the end of this chapter; although, in truth, such affairs appear to have taken his best energies and most of his time. John Thompson Mason and Arthur Shaaff had been the leaders of the Frederick Bar, and of these Mason had recently retired from active practice, and settled in Washington County, while Shaaff, though continuing to practice before the Frederick Court, had removed to Annapolis. He gave efficient aid to Taney in the early years of his Frederick residence. The latter's friendships with Key and Thomas were also of great value to him. The Fredericktown *Herald* for March 10, 1804, shows these four men, all Federalists, offering their legal services to a man who was prosecuted by Samuel Hughes, in a case in which Roger Nelson, the Democratic leader, was supposed to have been behind Hughes.

Taney's practice "literally grew by leaps and bounds."[58] At the February term of 1802, he appeared in five or six suits in the Frederick County Court; at

[56] He presented reports of Academies, Banks, etc.

[57] Jan. 30.

[58] 13 Md. Hist. Mag., p. 119.

the following term in August, in about two dozen; and at the February term of 1803, in between thirty and forty cases. From that time, and until his removal from Frederick, he appeared in a majority of cases, heard in that Court. His practice, however, was not confined to the County of his residence. As early as 1801, he was retained in two lawsuits in Hagerstown, the county seat of Washington County, which adjoined Frederick on the west.[59] Either of the suits involved an amount exceeding £277 Maryland currency, in which £1 was equal to $2.66\frac{2}{3}$. These cases were brought up for trial at the August term of 1803, and, though Taney lost both of them, he won two other suits at the same term, in which he appeared as counsel. From that time, until his removal to Baltimore, Taney frequently journeyed over the Catoctin, or South Mountain, to participate in litigation at Hagerstown, and he took part in a dozen or more causes at every term of the Washington County Court.

Before Taney was thirty years of age, he had appeared several times in the Court of Appeals, the highest tribunal of the State. His first appearance there was due to Mr. Shaaff, as his first appearance in the Frederick Court had been; for, at the October term of 1805, after he had been practicing for four years in Frederick, he assisted Messrs. Shaaff and Robert Goodloe Harper in the argument of an important action of ejectment, instituted in 1801 by Luther Martin, Attorney General of the State, who was supported by Mr. Dorsey and Philip Barton Key. The suit involved the rights of the State, succeeding to those of the Lord Proprietary, and obtained by him from the Royal Charter. The case was reargued during the June term of 1806, and

[59] 13 Md Hist. Mag., p. 120.

was decided against Shaaff and Taney; but the defeat was one suffered against a brilliant array of lawyers; for, besides those who had argued with Martin in the preceding year, John Thompson Mason, who had been appointed Martin's successor in July, 1806, and John Johnson, who succeeded Mason in the following October, were added.[60]

At the 1806 term of the Court of Appeals, Taney appeared in another case, in which he was asociated with Francis Scott Key. The case involved a question of dower, in which Taney's client had succeeded in the Frederick County Court; but Shaaff and Brooks, who had instituted the suit in behalf of a widow, secured a reversal by the Court of Appeals of the result in the Court below.[61]

In 1807, he did not appear before this Court, but, in 1808, his name appears as counsel in four cases. In one of these, he assisted Shaaff—a case coming from the Court of Chancery, and involving a bill for reconveyance of land filed in 1801, by John Johnson, Thomas Buchanan, and Luther Martin. The judgment in the Court of Chancery had been for the complainant, and, on the appeal, he was also successful, although Shaaff and Taney were joined by Ridgely and Philip Barton Key for the appellant.[62]

The other three cases were not of great importance, and it is interesting to observe that, in all of them, Taney and Shaaff were opposing counsel.

In one of these suits, Taney and Key were associated in an action for slander in which they represented the defendant.[63] In this case, they were fortunate,

[60] 13 Md. Hist Mag., p. 120. Howard v. Moale, 2 H. & J. 218.

[61] No briefs were filled. Keefer v. Young, 2 H. & J. 45.

[62] Bogden v. Walker, 2 H. & J. 248. 13 Md. Hist. Mag., p. 121.

[63] Sheely v. Briggs, 2 H. & J. 311, 363.

and succeeded in obtaining a reversal of a judgment secured in the Frederick County Court, for £ 22 against their client.

In the other two cases, Taney and Shaaff faced each other without associates. As Delaplaine writes: "Taney is no longer Mr. Shaaff's apprentice."[64] One of these suits was an appeal from the Frederick County Orphans' Court, which had admitted to probate a paper, designed to take effect as a will upon the happening of a certain contingency. Taney cited authorities to prove that the paper was void, since the contingency did not occur, and won the suit.[65] The other action was one of assumpsit, instituted by Taney at Frederick,[66] to recover against an estate for a year's service rendered as overseer in 1791, in which attempt Taney was successful.

Taney's first criminal case before the Court of Appeals, was one in which he defended a negro, Thomas Burk, charged with committing rape upon a white girl, Catherine Maria Brawner, under twelve years of age. The Grand Jury of Frederick County found an indictment in the case, in February, 1809,[67] but the case was removed to Hagerstown, where the negro was found guilty, and sentenced to be hanged. Taney and his associates, Messrs. Lawrence and Martin, moved for an arrest of judgment, and, when this was refused them, brought the proceedings before the Court of Appeals by writ of error. The counsel for the defence had made a careful study of the case and nearly one hundred of their authorities—a remarkably large number for so early a

[64] 13 Md. Hist. Mag., p. 123.

[65] Wagner v. McDonald, 2 H. & J. 346.

[66] Cushman v. Sims, 2 H. & J. 352.

[67] 2 Scharf's Western Md. 1108. 13 Md. Hist. Mag., p. 132. Burk v. State, 2 H. & J. 426.

case—are cited in the Reports. The Court decided in favor of the State, but the negro escaped hanging by escaping from the Washington County jail, on July 4, 1809.

Taney's other appearance in Annapolis in 1809 was with Shaaff, in an action for dower, which they lost, Luther Martin being the opposing counsel.

In 1810, Taney's only appearance before the Court of Appeals, was in an action for slander.[68] The suit had been filed by Philip Barton Key in the County Court at Rockville, Montgomery County, adjacent to Frederick, and Taney, endeavoring to escape the trouble of drawing up the pleadings, merely filed a plea of justification short, under an agreement with Key that the plaintiff would consent to waive his rights in the matter of formal pleading. A verdict for the defendant, Taney's client, was given in the *nisi prius* court; but, on appeal, Chief Justice Jeremiah Townley Chase, Taney's former preceptor, rendered an opinion reversing the verdict, briefly stating that "the plea of justification is not sufficiently pleaded, being put in short, and upon that ground the Court reverse the judgment." It is almost the only censure recorded upon Taney's diligence.

Four cases were argued before the Court of Appeals by Taney in 1811, arising in four different counties, a fact which shows how his practice was spreading. He lost three of them; an attachment case from his native County, Calvert;[69] a suit brought on an *assumpsit* in Washington County,[70] and an action for debt arising

[68] 13 Md. Hist. Mag., p. 118. Orme v. Lodge, 3 H. & J. 83.

[69] Fitzhugh v. Hellen. He and Dorsey opposed Thomas Buchanan and Magruder, 3 H. & J. 206.

[70] 13 Md. Hist. Mag., p. 129. The facts in the Washington County Case were these: Samuel Ringgold had made a promissory note for $2,500 in 1801,

in Frederick from a lottery drawing.[71] His success came in an action for assumpsit, brought in Montgomery County.[72]

In 1811, Taney did not appear in the Court of Appeals,[73] but, in that year, he was retained, together with John Hanson Thomas, to defend General James Wilkinson in a court martial held in Frederick.[74] Wilkinson, who had been Commander-in-Chief of the United States Army, was accused of having been an accomplice of Burr, in his western conspiracy. He was a native of Calvert County, like Taney, having been born there in 1757. He too had settled in Frederick County, practicing medicine along the Potomac, and residing between Point of Rocks and the mouth of the Monocacy River. He had served in the Revolutionary War, with credit, but was rightly regarded as an unreliable and untrustworthy man. Both Thomas and Taney had shared in the general belief that Wilkinson had been treacherous both to the country, and

and the note had been subsequently endorsed. The endorsee instituted an action of assumpsit, and obtained a verdict in Hagerstown. Ringgold's counsel moved on arrest of judgment, on the ground that the note did not contain the words *or order*, or *to bearer*, and was, therefore, not a negotiable instrument, hence the endorsee could not sue in his own name. The Court of Appeals held that the defendant's contention was correct, and Taney lost the case, which is one of his earliest in commercial law and banking, a class of cases in which he always took a great interest. Noland v. Ringgold, 3 H. & J. 216. He was associated with W. Dorsey and opposed by Thomas Buchanan.

[71] State v. Wolfe, 3 H. & J. 224. Taney was associated with Brooke, and opposed by Warfield.

[72] Lodge v. Boone, 3 H. & J. 218. Francis Scott Key opposed him.

[73] The New York Public Library possesses a letter from him, dated May 15, 1811, concerning the preparation of a deed, for Ignatius Davis.

[74] Wilkinson, with characteristic neglect, treats of this trial at considerable length in volume 2 of his Memoirs, but does not name his counsel. Vide 13 Md. Hist. Mag., p. 134, and Tyler, p. 104, which treat of Taney's part in the trial.

later to Burr; but, after studying the evidence carefully, they concluded that they had done Wilkinson an injustice, so that, for nearly four months, they labored assiduously in his defence, and refused to accept any fee for their professional services. Walter Jones, an able and subtle lawyer, who had a large practice before the United States Supreme Court, acted as Judge Advocate, and the Court, composed of thirteen high military officers, sat in Frederick, from early in September, 1811, until Christmas Day, when it adjourned with a verdict of acquittal. The result was a considerable triumph for Thomas and Taney. Madison, in his order concerning the decision, wrote:

> Although I have observed in those proceedings, with regret, that there are instances in the conduct of the Court, as well as of the officer on trial, evidently and justly objectionable, his acquittal of the several charges against him is approved, and his sword is accordingly ordered to be restored.[75]

In 1813, Taney had two unimportant cases before the Court of Appeals, which he won, and an important one, which he lost. The two former were concerned with opening a road,[76] and trespass in carrying away fence rails.[77] The latter was an action of ejectment, an appeal from the Washington County Court, dealing with the land of Jonathan Hager, the founder of Hagerstown.[78] A remarkable array of counsel appeared in this case: Luther Martin, William Pinkney, then Attor-

[75] 4 So. Lit. Mess, 348. An anonymous writer in 1838 stated that Wilkinson was particularly unpopular in Frederick, where he had successfully prosecuted an old and poor Revolutionary veteran.

[76] Greenwood v. Stone. 3 H. & J. 435.

[77] Gibson v. Kephart, 3 H. & J. 439. Brooke against Taney.

[78] Lawrence v. Heister, 3 H. & J. 371.

ney General of the United States, and Mason, opposing Key, Shaaff, and Taney.[79]

Tyler informs us that it was Taney's "habit to advise his clients to settle their disputes amicably," in all cases where he thought "this settlement could be accomplished." In 1813, a dispute between two former business partners in Frederick, led to acrimonious newspaper controversy.[80] The matter was referred by both parties to Taney as their counsel, and he arranged the difficulty amicably, closing the controversy by a written opinion, in which he stated:

There is nothing in the settlement that can impeach the integrity, or impair the reputation of either of you. My opinion was not given, on the ground that one has right, and the other has

[79] Tyler, p. 122, gives an account of another ejectment case at Hagerstown, in which Martin and Taney, then "a comparatively young man," were opposed to Shaaff. Martin had been very skilful, in the use of "the most subtle principles and the most complex forms of pleading in actions of ejectment." Taney had to study this case and prepare it for trial, without Martin's aid, but they finally started together for Hagerstown by stage coach, on the day before the trial. The distance is 26 miles, and every five miles, when horses were changed, "Martin drank at the tavern—whiskey, when he could get it, and, when he could not, he drank ale, and, when he could get neither, he drank buttermilk." On arriving at Hagerstown, they took supper together, and Taney told Martin that, after smoking a cigar and resting, "he would come to his room, and go over the case with him." At eleven o'clock, he found Martin in his room lying across the bed with his hat on, and dressed in all his clothes, except one boot, "asleep from his various potations." He called Martin in vain, and then, "much disturbed, but not daunted, he retired to his room, and studied the case until nearly day," to be ready to meet Shaaff's technicalities. In the morning, Taney called at Martin's room, but found the door locked and went to Court alone, fearing that Martin would not be in Court. Just as the case was called, Martin came in, and Taney told Tyler that, "in none of his forensic efforts, did he excel his skill in the management of this cause." Both he and Mr. Shaaff "showed the most extraordinary ingenuity, respectively, in bringing before the jury and in refuting evidences of the changes that the location of a spring of water might have undergone, which spring's situation would determine the disputed boundary."

[80] George Graff and Richard Lee Head. Tyler, p. 136.

wrong, on his side. Your differences had placed the partnership *property* in a very perplexing situation to both of you; and the settlement was made, not by arbitration, but by the agreement of yourselves in all the material points, on the principle of the mutual advantage to be derived from mutual concession. Tyler adds: By such delicate treatment of the feelings of both parties, he made those who had been mutual enemies, mutual friends.[81]

Taney argued[81] no cases before the Court of Appeals in 1814, but, in 1815, he appeared as counsel in no less than eight cases: Two of these cases were of ejectment, in both of which Taney was opposed to Luther Martin and was defeated. In an appeal from Frederick,[82] Taney was associated with Key, Shaaff and Brooke, but in an ejectment suit[83] coming from Washington County, the two lawyers faced each other alone.[84]

His most important case during 1816, was an appeal from the decree of the Orphan's Court of Anne Arundel County, admitting to probate a paper which had not been completed.[85] In this case, the brilliant array of

[81] The Frederick newspapers for August 21, and September 8, 1813, announce that Taney and Thomas appear for the plaintiff, and Pigman for the defendant in the case of John Johnson v. Joshua Medtart, in which case a *Habeas corpus de homine replegiando* was sued out.

[82] Shields v. Miller, 4 H. & J. 1.

[83] Easton v. Snavely, 4 H. & J. 17.

[84] Taney also lost a suit for debt against a trustee for the sale of land in which he represented the defendant. (Brooke was the opposing attorney, Schell v. State, 3 H. & J. 539.) He won a case in which he represented the plaintiff, claiming fraud in the sale of an unsound slave (Duvall v. Medtart, 4 H. & J. 14. Shaaff opposed him), and in a question of a warranty of a slave, which case arose in Montgomery County (Chilton v. Jones, 4 H. & J. 62), he argued for the defendant. He won two other unimportant cases from that county: of replevin for rent (Offutt v. Trail, 4 H. & J. 20), and on an administration bond, opposing Key in the latter case (State v. Wootton, 4 H. & J. 21). A case involving the obligation to support a bastard was also won by Taney, representing the father. (Grantz v. State, 4 H. & J. 121. Pigman was the opposing counsel.)

[85] 13 Md. Hist. Mag., p. 127. Tilghman v. Steuart 4 H. & J., 156. The Library of Congress possesses a manuscript opinion of Taney, dated Nov. 27,

attorneys comprised Martin and Shaaff as Taney's associates in the endeavor to reverse the Orphan's Court, and Robert Goodloe Harper, Steuart and Pinkney as their opponents. There was some question as to whether the deceased possessed the *animus testandi*, when the paper was written, and the case was one of moment; both because of the large amount of property involved, and because the law concerning the essentials of a will necessary to pass personal property, had not been settled by the Maryland Courts. The case was argued at two separate terms of the Court of Appeals, and each of the judges delivered a separate opinion; the decision, by a vote of 3 to 2, being in favor of Taney's contention, and reversing the decree of the Orphan's Court.[86]

In 1817, Taney won the two cases in which he appeared before the Appellate Court. One of these involved the rent of a plantation in Montgomery County,[87] and the other was his first Baltimore City case, in which Harper made him his associate for the appellant, and won it against the strong combination of Martin, Winder, and Winchester.[88]

Taney did not believe in the adage that he who argues his own case has a fool for a client, and, in 1818, appeared, *in propria persona*, in Taney vs. Kemp,[89] and won his suit, an action for trover for a bill obliga-

1815, given to D. Howard, attorney, to the effect that one Davis, who had leased a farm in trust for Deborah Pleasants in Montgomery County, had received sufficient notice to give up the farm, if his term had expired, no crop had been planted, and a month's notice had been given.

[86] Singstack v. Harding, 4 H. & J., 186. Shaaff opposed him and won. The case involved the price of land at an auction sale.

[87] Benson v. Hobbs, 4 H. & J. 285.

[88] Howard v. Rogers, 4 H. & J. 278.

[89] 4 H. & J. 348. T. C. Worthington was the opposing counsel.

tory, in which a witness refused to answer a question put to him.

Three victories and no defeat, was his record[90] in 1819. The first of these,[91] involved an appeal from the Anne Arundel County Orphan's Court as to a widow's dower, and there was a remarkable array of counsel. Winder, Chapman, and Marriott opposing Pinkney, Taney, Magruder, and Stephen. The other cases were actions of *assumpsit* in one of which,[92] arising in Baltimore County, Martin and Taney opposed Pinkney and Winder; and, in the other, arising in Prince George's County, Ridout and Taney faced each other without associates.[93] In the latter case, a son had given a note to his father, who indorsed it to a third person, and declared his intention of paying the note, though no demand for payment had been made on the son, and, consequently, no due notice of non-payment had been given. Taney argued successfully that, if the father's promise had been made in ignorance of the *facts*, he would not have been bound as the endorser of the note, but the legal maxim, *ignorantia legis non excusat*, was a part of the Common Law of Maryland, and affected this case.[93]

Taney's most important case in 1819, however, was his defense of Jacob Gruber in the Frederick County

[90] He also won a Montgomery County case (Benson v. Anderson, 4 H. & J. 315. Magruder opposed him), for trespass in carrying away negroes, and an appeal in an action of assumpsit (Allston v. Contee, 4. H. & J. 351, Magruder was opposing counsel); but he lost an appeal from Chancery, involving a question of proper parties to a case (Smith v. Baldwin, 4 H. & J. 331). In another Chancery case, involving the sale of the real property of a decedent, he won. Tyler v. Bowie, 4 H. & J. 333. Magruder was with him and Stephen against him.

[91] Coomer v. Clements, 4 H. & J. 480.

[92] Burt v. Gwinn, 4 H. & J. 507.

[93] Beck v. Thompson, 4 H. & J. 530. 13 Md. Hist. Mag., 128. C. J. Chase dissented.

Court.[94] Gruber was a Methodist Presiding Elder in Pennsylvania,[95] who visited a camp meeting in Washington County in August, 1818. Rather against his will, he was induced to take charge of the service on the 16th, and delivered a sermon of an hour's length to a congregation, estimated as comprising 3000 persons, of whom 400 were negroes. His subject was: "National Sins," his text,[96] "Righteousness exalteth a nation, but sin is a reproach to any people." After touching upon infidelity, intemperance, and profanity as such sins, he continued by naming slavery as also a sin. In this part of his sermon, he said: "We live in a free country; and that all men are created equal and have inalienable rights, such as life, liberty, and the pursuit of happiness, we hold as inalienable truths. But there are slaves in our country, and their sweat and blood, and tears declare them such. The voice of our brother's blood crieth. Is it not a reproach to a man to hold articles of liberty and independence in one hand, and a bloody whip in the other, while a negro stands and trembles before him, with his back cut and bleeding?" Gruber also compared Pennsylvania, where slavery had been abolished, with Maryland, to the discredit of the latter. Some of the slaveholders were enraged over this discourse, and felt that remarks such as these were likely to arouse slaves to rebellion, and thus place the masters and their families in danger. Accordingly, a warrant was issued for his arrest; he was apprehended, and gave bail. The Grand Jury of Washington County then indicted him, for instigat-

[94] See Tyler, p. 122 & ff., W. P. Strickland, "Life of Jacob Gruber," especially pp. 130 and ff. and 261 and ff., 13 Md. Hist. Mag., p. 136.

[95] Gruber had lived in Maryland in 1814 and 1815, and had been pastor of the Light and Sharpe Street Methodist Churches in Baltimore City.

[96] Prov. XIV, 34.

ing negro slaves to "commit acts of mutiny and rebellion, in contempt and in open violation of the laws, good order, and good government of this State, and to the evil and pernicious example of all others in like case offending, and against the peace, government, and dignity of the State." Gruber's friends had interested themselves, and Rev. S. G. Roszel wrote him from Middletown, on October 10: "I have seen Brother Pigman,[97] on the business, and he has promised to interest on your behalf, should you be arrested, Lawyer Taney, the most influential and eminent barrister in Washington and Frederick" Counties. Roszel advised removal of the case to Frederick. Pigman and Taney,[98] who took up the case, also felt that such removal was desirable, so the case was tried at Frederick, during the March term of 1819. John Buchanan presided as Chief Justice, and Abraham Shriver and Thomas Buchanan sat with him as associates.[99] Luther Martin had been retained to assist in the defence. Taney made the opening statement for the defendant, Pigman examined the witnesses, and all three lawyers made impressive arguments before the jury, after the evidence had been submitted. Taney's closing argument was an hour in length, and was considered "most effectual and conclusive," being delivered "with his usual eloquence and zeal." His opening argument, however, is the more memorable, for it showed his feelings as to slavery. He called attention to the fact that Gruber spoke facing the whites and not the negroes, who were separately placed behind the pulpit stand, as showing that the address was not made to

[97] Beene S. Pigman of Hagerstown.

[98] Taney was largely responsible for the removal, "being firmly convinced that there was no just cause for instituting this prosecution."

[99] Franklin Anderson conducted the prosecution.

the latter. Gruber was not on trial for preaching doctrines calculated to disturb the peace and order of society. If his argument was merely shown to be unsound and inflammatory, the indictment was not proven. A criminal intent must be made to appear, and the sermon did not show it. "But we must go farther," Taney continued, "and maintain the civil and religious rights of free speech."

Taney called the attention of the jury to Gruber's ministry in a denomination which has "steadily in view" the "gradual and peaceful abolition of slavery," and which forbade a slaveholder to become a member.

> Their preachers are accustomed, in their sermons, to speak of the injustice and oppression of slavery. The opinions of Mr. Gruber on the subject no one could doubt, and, if any slaveholder believed it dangerous to himself, his family, or the community to suffer his slaves to learn that all slavery is unjust and oppressive, and persuade himself that they would not, of themselves, be able to make the discovery, it was in his power to prevent them from attending the assemblies, where such doctrines were likely to be preached. Mr. Gruber did not go to the slaves; they came to him. They could not have come, if their masters had chosen to prevent them.

Taney forced the fighting, and said that Gruber felt it his duty

> to avow and to vindicate here the principles which he maintained in his sermon. There is no law which forbids us to speak of slavery as we think of it. Any man has a right to publish his opinions on that subject, whenever he pleases. It is a subject of national concern, and may, at all times, be freely discussed. Mr. Gruber did quote the language of our great act of national independence, and insisted on the principles contained in that venerated instrument. He did rebuke those masters, who, in the exercise of power, are deaf to the calls of humanity; and he warned them of the evils

they might bring upon themselves. He did speak with abhorrence of those reptiles, who live by trading in human flesh, and enrich themselves by tearing the husband from the wife, the infant from the bosom of the mother; and this, I am instructed, was the head and front of his offending. Shall I content myself with saying he had a right to say this? that there is no law to punish him? So far is he from being the object of punishment, in any form of proceeding, that we are prepared to maintain the same principles, and to use, if necessary, the same language here, in the temple of justice and in the presence of those who are the ministers of the law.

Then followed memorable words:

A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily, or suddenly removed. Yet, while it continues, it is a blot on our national character; and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away; and earnestly looks for the means by which this necessary object may be best attained. And until it shall be accomplished, until the time when we can point without a blush to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.

This forceful and shrewd defence made such an impression upon the jury, that, after short deliberation, they rendered a verdict of not guilty.[100] "There was a great crowd, great curiosity, and great excitement at the Court;" but the case is chiefly to be remembered now, because of Taney's ringing words, attacking the treasured institution of the South.

[100] Gruber wrote afterwards that his "chief lawyer," probably Taney, was paid $200 as a fee, and had been engaged by Gruber's friends, without his knowledge or request. Gruber was not very grateful to his attorneys, vide Life, p. 257.

Seven cases were argued by Taney before the Appellate Court in 1820.[101]

He lost a slander suit coming from Frederick, in which he was opposed by two great lawyers: one, William Pinkney, of a passing generation, and the other, Reverdy Johnson, of a generation just coming upon the scene.[102] Taney was associated unsuccessfully with Pinkney in a Chancery appeal concerning a trustee's rights of a sale.[103]

Harper called Taney in 1821 to assist him in winning the case of Browne v. Kennedy, in which Pinkney, Winder and Williams were the opposing counsel.[104] The suit in ejectment involved riparian rights, founded on the original proprietary title, to land reclaimed from the navigable waters of Maryland. Chief Justice Chase delivered the opinion of the court in favor of Harper's and Taney's contention that, under the laws of England and the charter of Maryland, the grantees of property on both sides of Jones's Falls in Baltimore City, obtained the right of accretion by alluvion, or by the gradual recession of the waters *ad filum medium aquae*. He also won an appeal from a judgment against a debtor,[105] in which case he and Pinkney argued against William Schley and Reverdy Johnson. Three cases

[101] He won one and lost the other (Fonher v. Kemp, 5 H. & J., 135. Rideout opposed him) of the two ejectment cases from Washington County. From the same county came a case (Beall v. Bayard, 5 H. & J. 127) involving trespass upon the Antietam Iron Works, in which he was opposed by Martin at first, and was defeated, but, securing a new trial, in which he was opposed by Stephen, he was finally successful (Snevely v. M'Pherson, 5 H. & J. 150). He won an appeal in action of assumpsit from Frederick (HagerstownTurnpike Road v. Cruger, 5 H. & J. 122. Pigman opposed him), and an action of trover brought against a Deputy Sheriff, who was Taney's client. Mark v. Lawrence, 5 H. & J. 64. Pigman opposed him.

[102] House v. House, 5 H. & J. 125.

[103] Davis v. Simpson, 5 H. & J. 147. Pigman was opposing counsel.

[104] 5 H. & J. 195. Tyler, 132. 13 Md. Hist. Mag., p. 139

[105] Creager v. Brengle, 5 H. & J. 234.

were lost by Taney, however, in that year: A suit of replevin for slaves, arising in Montgomery County,[106] a case[107] involving an executory contract coming from Washington County, and a petition for freedom made by negroes in Harford County.[108] In this case, he was opposed by the forgotten political economist, Daniel Raymond, and by Reverdy Johnson, and was without assistance. A deed of manumission had actually been executed, in compliance with the provisions of a will, and Taney was unable to upset the verdict of the County Court, which granted emancipation to the ten negroes who claimed it. Taney had manumitted his own slaves, and, in the Gruber case, had announced his opposition to slavery; but he saw no inconsistency, in endeavoring to secure for slaveholders, what he believed to be their rights under the law of the State.

In 1822, he fought to a successful issue a suit involving a devise to St. Peter's Protestant Episcopal Church in Baltimore City. Assisted by Winder and Murray, and opposed by Harper and Reverdy Johnson,[109] he secured a decision from the Appellate Court to the effect that the Statute of 43 Elizabeth as to Charitable Uses was not in force in Maryland, and that, independently of that Statute, Chancery cannot enforce a devise to charitable uses. He also won a chancery appeal from Anne Arundel County.[110] The other two cases which he argued in that year, were lost by him. In one of these,[111] he was allied with Harper against Wirt, and,

[106] Stephen opposed Taney and Schley. Culver v. Shriver, 5 H. & J. 218.

[107] Reverdy Johnson and Schley opposed Taney and Magruder. Eichelberger v. M'Cauley, 5 H. & J. 213.

[108] Hughes v. Negro Milly, 5 H. & J. 311. 13 Md. Hist Mag. p. 132.

[109] Dashiell v. Attorney General, 5 H. & J. 392.

[110] Warfield v. Warfield. Taney and Winder opposed Pinkney and Magruder. 5 H. & J. 459.

[111] Patterson v. Marine Insurance Company, 5 H. & J. 417.

vainly, endeavored to induce the Court of Appeals to take his view as to an action of covenant on an insurance policy issued on a ship for a voyage in 1813, from Baltimore to Lisbon, on which voyage the British seized the ship. In the other case, arising in Charles County,[112] the suit was brought for slander as to words spoken to a United States Senator concerning another man's fitness for office, and the Court ruled that malice had not been proven, and that the words spoken, confidentially, in answer to the Senator's request for information, were not actionable.[113]

Before removing from Frederick in 1823, Taney argued three cases before the Court of Appeals, all of which he won. One of these cases concerned a bequest in Caroline County to charitable uses, and was won by Taney and his associates, the same lawyers being engaged as in the Baltimore case of the preceding year.[114] In a second case, he secured the setting aside of a verdict against a man accused of giving a pass improperly to a slave,[115] while the third case was a chancery one, involving an award by arbitrators.[116]

It is interesting to note that not one case argued by Taney came from the Eastern Shore, that only one came from Taney's native county, and that the great majority of them were from Frederick and its adjoining counties. Taney felt that this "pent up Utica" should not longer "contain his powers, "and prepared to remove to Baltimore.[117] In February, 1823, he sold his home

[112] He was opposed by Harper and Magruder and associated with Winder and A. C. Bullitt.

[113] Law v. Scott. 5 H. & J. 438.

[114] Dashiell v. Attorney General. 6 H. & J. 1.

[115] Duvall v. State. 6 H. & J. 9. T. B. Dorsey opposed Taney.

[116] Cromwell v. Owings. 6 H. & J. 11. Taney and Winder were opposed by Heath and Reverdy Johnson.

[117] 13 Md. Hist. Mag., p. 140.

on Bentz Street, together with about two acres of land, and his furniture was sold at auction on April 25. The lot he had bought on Church Street, was also offered for sale, but was not disposed of until a year later.

He was forty-six years of age when he left Frederick, and he ever retained an affection for the place, which led him to have his body buried there.[118] After he died, Reverdy Johnson, whose rise to prominence at the bar was coincident with the later years of Taney's Frederick career, spoke thus of Taney, as he knew him in an acquaintance dating back to 1815,[119] in which year Johnson "was admitted to practice in the Court of Appeals. At that time, the Maryland Bar was adorned by Winder, Dorsey, Harper, Pinkney, and Martin, all of them men of profound legal learning, some of them of dazzling and extraordinary eloquence." "In this galaxy of talent," Johnson continued, "Mr. Taney shone with a splendor that challenged admiration, and made him, in the opinion of all, their equal. Whilst enjoying the confidence of his elder brethren and admitted to be in every way their peer, he was especially dear to his juniors. It was my good fortune to have his confidence and his friendship almost from the first, and greatly did I profit by it. Often his associate, and often his opponent, I had constant opportunities of judging of his legal learning, of his ability in its use, and the fair and elevated ground upon which he ever acted. In neither relation is it possible to exaggerate his excellence. In those respects, he was a model that his elder contemporaries were proud of, and his juniors admired and kept before them as an example."

[118] S. T. Wallis's Works, I, 143.
[119] Tyler, p. 493.

CHAPTER V

Career at the Baltimore Bar (1823–1831)

In 1823, Taney removed to Baltimore to secure a wider field for his practice and took a house on South Gay Street, whence he removed in 1825, to a double house on the north side of Lexington Street, one door east of the corner of St. Paul Street, a house which stood, occupied by lawyers' offices in its later years, until it was torn down in March, 1918. He was opposite the Court House, a little over a block from the Battle Monument, and little further away from Guy's and Barnum's Hotels. John H. B. Latrobe lived next to him, on the corner, and the relations of the two neighbors were not always pleasant.[1] Severn Teackle Wallis, who was to be Taney's eulogist, lived around the corner, and Reverdy Johnson lived opposite Barnum's Hotel, and so was not far away. The society was a compact little one into which Taney entered and one in which lawyers were an important social element. The bar was a brilliant one. Martin and Pinkney had recently died, but William H. Winder and Robert Goodloe Harper[2] were in full practice and William Wirt came frequently to try cases, although he did not remove to Baltimore until 1829.[3] Reverdy Johnson, in his later years, wrote[4] that the leading lawyers in Baltimore at that time were "as

[1] See John E. Semmes, "Life of J. H. B. Latrobe," p. 202, Reverdy Johnson served as arbitrator, when Taney claimed that Latrobe trespassed upon his lot, in the course of extending a backbuilding.

[2] Latrobe read law in his office, Semmes's Latrobe, 98.

[3] John P. Kennedy's "Life of Wirt," vol. II, p. 226.

[4] Letter to Samuel Tyler July 6, 1871 in Maryland Historical Society. 13 Md. Hist. Mag. 169.

able as any members of the profession in the country" and Kennedy's praise is not too high, when he states that the Baltimore bar of those times "was distinguished by an extraordinary assemblage of the highest order of talent:—men who singly would have shed lustre upon any professional assemblage in the country and who, united on this theatre, composed a constellation which attracted universal notice." During the twenties, four of the six leaders of the bar died shortly after each other and soon only Taney remained, but the younger generation were not unworthy successors and Jonathan Meredith, Reverdy Johnson, John V. L. McMahon, John H. B. Latrobe, John Glenn, and William Schley stepped into the places left by the earlier men. At the head of this group stood Wirt and Taney—"instructors to guide, models to be imitated, gifted with all qualities to stimulate the ambitions of generous minds striving after an honorable reputation," as Kennedy writes.

Wirt told an amusing incident in reference to Taney, in a letter written Mrs. Wirt from Baltimore, on October 30, 1825, the day after both lawyers had dined at Mr. Oliver's with the Duke of Saxe Weimar, who was visiting America. The Duke sat between Messrs. Oliver and Barney, "neither of whom seemed to be able to find him in talk." Wirt sat next Taney, until the latter, who is described by Wirt as "a pious Roman Catholic, as well as a most amiable gentleman," said,[5] "Come, Mr. Barney, Mr. Wirt and I sit side by side quite enough in Court; let me change places with you," his object being to amuse the Duke. The change was made and the Duke soon pronounced a "philippic against the Roman Catholic religion, which he blamed for all the political conspiracies in Europe. Taney

[5] Tyler p. 161 quoting Kennedy's Wirt II p. 177.

took the occasion to tell him that he was a Roman Catholic. This produced some embarrassment, but the Duke got over it. Taney changed the subject to the war, in which the Duke had figured particularly at Waterloo—and unluckily asked the Duke about Blucher. Now Blucher, it seems, had on some occasion gone into the Duke's territories, and was exacting contributions from his subjects, which the Duke hearing of, he had him put in prison. So here was a new *contretemps*, followed by a general pause at the table."

Soon after his arrival in Baltimore, Taney was elected counsel for the Union Bank of Maryland and also became one of its directors. The president of this institution was a man of great power, Thomas Ellicott,[6] and the senior director was a much respected Hebrew, Solomon Etting. The association with these men and the natural rivalry between bankers goes far, as we shall see, to explain Taney's deep seated hostility towards the United States Bank, of which a branch was located in Baltimore.

A second momentous event in Taney's life occurred shortly after his removal from Frederick. He had been a life long Federalist and had never forgiven John Quincy Adams for his acceptance of the position of the Jeffersonian Republicans in the years preceding the War of 1812. In 1824, Adams became a candidate for the Presidency. So personal was political feeling in those days that important Federalist leaders in Maryland felt that they could not support Adams. Robert Goodloe Harper, still claiming to be a "staunch Federalist," commented to Latrobe in "no measured terms" on Adams' conduct, as of one who had left that party, and, because of Harper's influence, Latrobe voted for—Andrew Jackson![7]

[6] Semmes's Latrobe 399 to 410.

[7] Semmes's Latrobe, pp. 111, 119.

Charles Carroll of Carrollton, who had always been a Federalist, agreed with his son-in-law, Harper, and so did Taney. Carroll and Taney urged Henry Ridgeley Warfield, a member of the House of Representatives from Western Maryland, to vote for Jackson, when the election came up in the House, into which it had been thrown, since no one had secured a majority in the electoral college. Warfield went to Adams[8] with an undecided mind and said that Carroll and Taney were "under the impression" that, if Adams "should be elected, the administration would be conducted on the principle of proscribing the Federalist party." Adams told Warfield that he would "proscribe no party. It was true that he had differed from the Federalist party, but had always done justice to the individuals composing it." He expressed regret that Taney, "of whose talents I heard high encomiums, should harbor such opinions of me." Warfield went away satisfied to vote for Adams, but this seemingly capricious and unreasonable decision of Taney to vote for Jackson was never reconsidered and led him to become a thorough supporter and intimate friend of the founder of the Democratic party.

Taney supported Jackson in 1828, when he defeated Adams, and, by this time, had become a thorough advocate of the Democratic party. He was now recognized as one of the leaders of that party in Maryland, as he had been of the Federalists. He wrote confidentially[9] on August 14, 1829, to recommend Mr. Sands for the collectorship of the customs at Annapolis. Ingham suspected Taney of being governed by old political attach-

[8] On February 17, 1825, J. Q. Adams's Memoirs, VI, 499.

[9] Taney was about to spend a fortnight in Taneytown. Manuscript in New York Public Library.

ments, but Sands' appointment, especially since Green, the Annapolis postmaster, was a Federalist, would advance the "cause of Jacksonism," which Taney professed to be the "only *-ism* about which I now feel any concern." He had recommended no other officer outside of Baltimore. On September 16, he wrote again,[10] after a visit to Frederick, in which county he hoped the Jacksonians would carry the election and also obtain a majority in the House of Delegates. He still preferred to have Sands appointed, but had not known that so many wished the office. He felt that "the interest of the party" required the appointment and that the "appointment of another Federalist to the only other office under the general government worth having would not be well received."

We catch a few miscellaneous glimpses of Taney during this period. Writing from Washington[11] to his daughter Sophia on February 22, 1825, he spoke of his indisposition; of his missing his family, and of the trouble that his daughter Maria suffered from her eyes. He was becoming known outside the State, so that, when Latrobe visited the aged James Madison[12] in 1832, the latter asked a great many questions about Taney and his opinions and got Latrobe to describe him. Always a devout worshipper in the Roman Catholic Church he became the adviser for Archbishop Ambrose Maréchal of Baltimore, in a controversy which the prelate had with the Jesuits. We find a curious linking of Taney with the Roman advocates and jurists, when we read that

[10] His correspondent had offended Schley and Taney advised him to write Schley and state that the information contained in Smith's letter was not received from him. Taney would have spoken to Schley about the matter, if he had seen him. Manuscript in New York Public Library.

[11] 13 Md. Hist. Mag. 171.

[12] Semmes's Latrobe, p. 244.

Maréchal relied on "*clarissimum R. B. Taney, qui inter jurisperitos nostros longe eminent, qui per plures annos honorabili officio senatoris in legislatum Marylandi functus est.*" Taney advised Maréchal that it would not be improper to refer the controversy to Pope Pius VII. Word of this came to John Quincy Adams, who was then Secretary of State, and, through D. Brent, the Chief Clerk of the Department, he sent Maréchal a letter, "regretting the appeal to a foreign state, touching the administration of temporal concerns" under the jurisdiction of this country. On receipt of the letter, Maréchal showed it to Taney, when he came to the archbishop's residence, on Sunday, October 24, 1824, after mass, and that "amiable and excellent gentleman" was deeply affected by the report of the "false colors under which Maréchal's proceedings had been represented" to Mr. Adams.[13]

In 1827, Governor Kent, who was a Federalist, appointed Taney as Attorney General of Maryland, upon the unanimous recommendation of the Baltimore Bar.[14] In later life, Taney often said that this was the only office he desired to hold. The Attorney General at that period "had the appointment of Deputy Attorneys of the State in the several judicial districts" and Tyler informs us that "in these appointments, while he showed his regard for the public interests, he manifested his personal friendships for those who stood in need of aid in their struggles at the beginning of professional life.[15] The records of the office were imperfectly kept and Governor Albert C. Ritchie, when Attorney General, could find no references in the office

[13] Thos. Hughes, "History of the Jesuits in North America," Documents I, pp. 491, 556, 1073, 1079, 1148.

[14] Tyler, p. 163.

[15] Tyler, p. 164.

to Taney's incumbency. He held the position until July 23, 1831, when he resigned, to accept the Attorney-Generalship of the United States. We possess, however, a vivid description of his appearance at that time from Latrobe's graphic pen.[16]

When Mr. Taney rose to speak, you saw a tall, square shouldered man, flat breasted in a degree to be remarked upon, with a stoop that made his shoulders even more prominent, a face without one good feature, a mouth unusually large, in which were discolored and irregular teeth, the gums of which were visible when he smiled, dressed always in black, his clothes sitting ill upon him, his hands spare with projecting veins,—in a word a gaunt, ungainly man. His voice, too, was hollow, as the voice of one who was consumptive. And yet, when he began to speak, you never thought of his physical appearance, so clear, so simple, so admirably arranged, were his low voiced words. He used no gestures. He used even emphasis but sparely. There was an air of so much sincerity in all he said that it was next to impossible to believe he could be wrong. Not a redundant syllable, not a phrase repeated, and, to repeat, so exquisitely simple. I remember once hearing him in a complicated case, and when he sat down, fancying that I, in my first year's practice, could have done as well, so simple had become complications in his hands.

The story is told that William Pinkney said of Taney: "I can answer his arguments, I am not afraid of his logic, but that infernal apostolic manner of his, there is no replying to."[17]

His manner to young lawyers was considerate and quite different from Wirt's. When Robert Goodloe Harper died, Latrobe was asked to take his place in a suit and be junior counsel to Taney.[18] Taney asked to

[16] Semmes's Latrobe, p. 202.

[17] Semmes's Latrobe, p. 203.

[18] Semmes's Latrobe, p. 200. The case was probably Oliver v. Gray 1 H. & J. 204.

see the brief which Latrobe had prepared and "spoke kindly of it and then, saying that it was only fair" that Latrobe should see his brief, handed it to Latrobe. When Latrobe proposed to return it, "Not at all," Taney replied, "I placed it at your disposal. If you can make use of it, I shall be better pleased, though do not let it interfere with your own line of argument." When Latrobe said "something about availing of his labors," he answered: "Never mind that, I shall, no doubt, find something to say in answer to the other side—some pickings and stealings." After writing down the account of this incident, Latrobe added: "This was Mr. Taney's way invariably. In numerous cases afterwards, he was the same liberal colleague."

Together with Jonathan Meredith, Taney and Latrobe were counsel for Mrs. Barnum in the Barnum-Gilmor divorce case, before the General Assembly, a *cause célèbre* of that period. When the three had gone over Latrobe's report of her story, before the evidence had been given, Taney said to his associate:[19]

> Are you quite sure, Brother Latrobe, that the Committee on Divorces will not suspect your handiwork as they listen to the production? Suppose now that, without altering an idea or changing the position of a sentence, you try how simply you can tell the story. The facts, you know, are all we want and these in the fewest words.

Taney was counsel for the venerable Charles Carroll of Carrollton and drew up his will, except the last codicil, of which Mr. Latrobe was the author,[20] and an interesting light is thrown upon Taney's practice by a letter he wrote Carroll, on January 1, 1825, concerning

[19] Semmes's Latrobe, p. 209.

[20] Semmes's Latrobe, p. 290.

the Browning claim.[21] Taney advised that the case be compromised, as probbably this could be done for less than Taney should charge for his argument in the case. Mr. Carroll persisted in the prosecution of the case which finally reached the Supreme Court of the United States, as we shall see.[22]

Taney's "only aim in life" at this time was professional.[23] "He worked by day and by night. Professional duties and his home circle occupied his whole time. Not a moment was spent in fashionable life. He looked at the world from the point of duty" and yet his earlier biographer adds that he did not omit "greeting with singular cordiality every one he met."

Taney's practice was not as extensive and lucrative as that of Reverdy Johnson and, curiously enough, he lost a very large proportion of the cases in which he was engaged in the Court of Appeals. Defeat, however, never daunted him and I suspect that he took many of the cases because they were hard. He practiced in the United States District and Circuit Courts and, of course, a very large part of his time was occupied by that *nisi prius* work, so important for the well-being of the community and yet having so little permanent record for the biographer.

In 1823, he appeared as counsel in three cases in the Court of Appeals, in one of which he acted as counsel for the Union Bank. The cases dealt with a sheriff's qualifications, debt on an appeal bond, and the alleged negligence of a bank in regard to an insolvents' bill.[24]

[21] Manuscript in New York Public Library.

[22] Henry Carroll administrator of Louisa Browning v. Charles Carroll of Carrollton 11 Wheaton 135.

[23] Tyler, pp. 160, 166.

[24] 6 H. & J. 116, Roberts v. Gibson, appeal from Chancery. Wirt, Magruder and Kerr against F. B. Dorsey and Taney; (Taney's first Eastern Shore case);

Seven cases are reported in 1824, in which Taney was engaged as counsel.[25] The year 1825 was a busy one for Taney in the Court of Appeals, for fourteen cases are reported in which he made arguments there.[26] One is impressed by the brilliancy of the Bar, and notices the facts that a case is seldom managed by one lawyer and that the grouping of the lawyers changes in a kaleidoscopic manner. In two of these cases, Taney was opposed to Key, his brother-in-law, and, in one, he was associated with him. His practice included cases from Western and Southern Maryland as well as from Baltimore and its vicinity.

134 Karthaus v. Owings. Winder against Taney and Reverdy Johnson; 146 Jackson v. Union Bank, Winder and Myers against Taney and Mitchell.

[25] Three of these dealt with title to land (one of which was an action in ejectment and the others were equitable cases), one was for a debt claimed as due on a bond, one an execution on a judgment, one an alleged false return of a sheriff, and one an assault and battery case.

6. H. & G. 182 Barney v. Patterson's Lessee, Wirt and Harper v. Taney and Magruder; 229 Graham v. Yales, Taney and Reverdy Johnson against Harper and Magruder; 231 Cranford v. the State, Taney against Magruder; 261, Smith v. Dorsey, Ashton and Reverdy Johnson, against Magruder and Taney; 264 Harding v. Stevenson, Reverdy Johnson and Glenn, against Wirt and Taney; 268 State v. Dashiell, T. B. Dorsey and Nicholas against Taney and Tyson; 288 Drury v. Conner, Taney and Scott v. Magruder and Brewer.

[26] Of the fourteen cases four were chancery ones (one of these dealt with the recovery of money and one with a deed to land), two were actions of ejectment, two were actions of assumpsit to recover a paving tax, one was on a covenant, one on the rights of trustees, one on the construction of a will, one on the endorsement of a note, one on a lease of land and rents, one was an action of replevin for a slave in St. Mary's County.

6. H. & J. 302. Thompson v. McKim. Stewart, Taney and Wirt against Emory and Winchester: 336 Beall v. Tyson, Taney against Harper and Speed; 364 Lyles v. Digges, Magruder and F. S. Key against Jones, Taney and Marshall; 375 Mayor of Baltimore v. Moore, Taney and Scott against Harper, Reverdy Johnson, and Howard; 383, Mayor of Baltimore v. Howard, Same lawyers; 408 Allegre v. Md. Ins. Co., Mayer, John Glenn and Taney against Lloyd and Wirt; 415 Fenwick v. Forrest, Causin and F. S. Key against Magruder and Taney; 427, Williams v. Ellicott, Taney v. R. B. Magruder; 460 Wirt v. Briscoe, Taney, Magruder and F. S. Key against Jones and Reverdy

In 1825, Taney was admitted to the Bar of the United States Supreme Court and argued there two admiralty cases, both of which he lost.[27]

The Maryland reports for 1826 show fourteen cases argued by Taney, in one of which he was counsel for the Union Bank.[28] One of the other cases, that of Ringgold v. Ringgold, which came up from the Cecil County Court, had engaged in it a galaxy of seven lawyers, three associated with Taney and three agaist him, forming a most remarkable combination of talents. The case was an equitable one, dealing with the relations of

Johnson; 472 Lemonier v. Godfroid, Taney and Mayer against Mitchell and Glenn; 475 Darne v. Gatlett, Taney and B. Forrest against Magruder; 501 Lammot v. Bowly, Williams, Taney, and Harper against Reverdy Johnson and Wirt; 527 Cumberland Bank v. McKinley, Jones and Speed against Taney; 529 Williams v. Mayor of Annapolis, Magruder and Taney against Brewer, Mayer and Jones.

[27] Manro v. Almeida 10 Wheaton 473. The Gran Para (Consul General of Portugal, Libellant) 10 Wheaton, 497. (See I Story's Story, 40.)

[28] Four cases arose out of wills, two of these cases being concerned with devises of realty, one case dealt with letters of administration, two cases were actions of assumpsit, one case was an action of debt, two cases arose from mortgages to banks, one was for an ejectment, one an action of replevin and two were suits in equity concerning land.

7 H. & J. 55 Cromwell v. Owings, Taney and Mayer against Reverdy Johnson; 73 James v. Lawrence, Palmer against Taney and Gill—a Frederick County case; 92 Clopper v. Union Bank, Williams and Reverdy Johnson against Taney and Kennedy; 105 City Bank v. Bateman, Taney and Glenn against Wirt and Reverdy Johnson; 134, Gist v. Cockey, Heath and Reverdy Johnson against Scott and Taney; 141 Rogers v. Moore, Magruder against Taney and Rogers; 161 Chase v. McDonald, Wirt, Magruder, and Mayer against Taney, Moale and Reverdy Johnson; 202 Parnell and Smith v. Farmers Bank, Taney and Gill against Magruder; 208, Benson v. Masseter—a Frederick case—Reverdy Johnson and Gill v. Taney; 320, Kemp v. McPherson —a Frederick case—Palmer and Taney against Ross and Magruder; 345 Dorsey v. Smith, Charles Dorsey, Magruder, and Taney against Reverdy Johnson; 388 Semmes v. Semmes, Stonestreet and Taney against C. Dorsey and Brawner; 1 H. & G. 9 Sewell v. Sewell—a Calvert County Case—C. Dorsey against Boyle and Taney; 11 Ringgold v. Ringgold, Wirt, Jones, Taney and Magruder against Berrien, Hoffman and Mayer.

trustee of land to the *cestui que trust* and Tyler[29] is quite correct in saying that the relation, "in every respect and every phase of obligation and reciprocal right and duty, under the most varied circumstances, was thoroughly discussed, under all the light of learning belonging to the doctrine[30] of trusts. And the case is marked by the precision with which the controversy and the relief is kept within the pleadings."

In 1826, Taney pleaded two cases before the United States Supreme Court. One of these was a most important case politically rather than legally—that of Solomon Etting v. The Bank of the United States. In that case Taney associated Daniel Webster with him as counsel. Judge Story was considerably impressed by Taney's argument and wrote home that Taney is "a man of fine Talents."[31] Attorney General Wirt and Emmet represented the Bank. James W. McCullough, had been cashier of the Baltimore Branch of the United States Bank.[32] He speculated with the funds of the Bank, and together with his partners owed the institution three and one half million dollars. McCullough received a salary of $4000 a year and had no property. After the Bank discovered the cashier's misconduct, but while he was still in office and the Bank Directors still kept their discovery secret, sixteen merchants of Baltimore were induced to become bound to the Bank as his security to the sum of $12,500 each. Then Mr. McCullough was removed by the Directors, for "unauthorized and fraudulent appropriation of their funds to his

[29] p. 162.

[30] The report of the case extends from page 11 to page 86 of 1 H. & G.

[31] Etting v. U. S. Bank. 11 Wheaton 59, I Story's "Life of Story," p. 541, 13 Md. Hist. Mag. 115.

[32] He was the appellee in McCulloh v. Maryland, his name being spelled in a different way.

own use," which knowledge the Bank did not promulgate, though they contemplated McCullough's removal, as soon as the securities had been given. When demand for payment was made upon Etting, he refused it, since he had endorsed McCullough's note, without knowing that he had been guilty of fraud, or abuse of office. Taney lost the case, but the revelations made in the course of it could not fail to confirm him in his hostility to the Bank and his suspicions of the institution. We must remember, also, that during all this time Taney continued to be counsel and director of the rival Union Bank, whose strong minded president was his trusted friend. Taney's other case in 1826 was that of Henry Carroll, Administrator of Louisa Browning, v. Charles Carroll of Carrollton, which involved the proprietary's quit-rents[33] In this case Taney was employed by the State of Maryland and was associated with Wirt. After the decision was rendered, as no answer came from the State authorities at Annapolis to Wirt's letter informing them of the decision of the case, Wirt wrote Taney a sprightly letter on March 30, stating he had not spoken of fees, "which I thought would be rather unseemly on *our* part (for I had spoken in both our names) toward the State of Maryland, our liege mother. But the old lady is maintaining a rather unnatural silence on her part; for I have not received a single word in reply, not even in the form of thanks, for our *great* and *successful* exertions —for, as nobody else will praise us, why should we not praise ourselves?"

Taney was appointed Attorney General of Maryland in 1827. In that year, taking Reverdy Johnson as his junior counsel, he argued for the State the case of

[33] 11 Wheaton, p. 135, Tyler, p. 163; 13 Md. Hist. Mag. 115, I Story's Story, 542.

Brown v. Baltimore before the Supreme Court, having Meredith and Attorney General Wirt against him. The State of Maryland had passed a law, requiring that a man who sold imported goods in the original package must take out a State license and the Supreme Court held that this law was unconstitutional. The decision[34] was one of Marshall's leading ones and Taney, though chagrined at the time by defeat in a cause in which he believed, later confessed that he had been wrong in his contentions at this trial.[35] At the same term he was counsel in two other cases, which he also lost. In the United States v. Gooding, together with Mitchell, he unsuccessfully contended for the defendant, in a case involving the African slave trade, against Wirt and Coxe.[36] In Drummond v. Executors of Prestman,[37] together with Donaldson, he strove in vain against Wirt and Meredith, in a case in which the Court decided that a judgment against a principal is evidence of the amount due from him in an action against his guarantor.

In the Maryland Court of Appeals during 1827, Taney was counsel in eleven cases.[38] In a case in which

[34] 12 Wheaton, p. 419. I Story's Story, 542.

[35] Shown by his statement in an opinion when on the bench in the License Cases, 5 Howard 504.

[36] 12 Wheaton, p. 460.

[37] 12 Wheaton, p. 516.

[38] The other cases related to covenant, debt, fire insurance, the Statute of limitations, guardianshp, an ante-nuptial settlement, an execution under a *fieri facias*, a replevin for a slave (originally brought in 1816), and a replevin for a vessel.

1 H. & G. 175 Betts v. Union Bank, J. Glenn and Taney against Reverdy Johnson; 204 Oliver v. Gray, Latrobe and Taney v. Raymond and Gwynn; 220 Drury v. Conner, Taney against Brewer and Magruder; 231 Raborg v. Bank of Columbia, F. S. Key against Taney; 295 Jolly v. Baltimore Equitable Society, Williams against Wirt and Taney; 308, McEldery v. Flannegan, Reverdy Johnson and Taney against Wirt, Meredith, and Evans; 324 Union

he represented the Union Bank, he showed his skill as a special pleader. One case in which he opposed Key, concerned days of grace.

The case of Oliver v. Gray[39] was an important one, setting the doctrine of the law in regard to the basis upon what a suit should be brought, so as to escape the provisions of the Statute of Limitations, where an acknowledgment of a debt had been made, after the period of limitation had occurred. Tyler correctly states that "the very comprehensive and elaborate opinion of the Court indicates, by its accurate analysis of the situation, the thoroughness with which it had been discussed at the bar."

Though Taney came from an inland town, he soon so mastered marine law and the law of marine insurance that he was later to become a great admiralty judge. He was employed in a considerable number of such cases[40] and, in 1828, won a marine insurance case in the Supreme Court—his only appearance there in that year. In this case Meredith was with him and Wirt and Ogden opposed him.[41] He argued only five cases that year in the Court of Appeals.[42]

Taney argued one case in the Supreme Court in

Bank v. Ridgely, Taney, Reverdy Johnson and Eichelberger, against Mitchell and Kennedy; 434, Thomas v. Turvey (submitted without argument), Stonestreet against Taney, Magruder, and C. Dorsey; 444 Williamson v. Dillon, Scott and Taney against Meredith; 2 H. & G. 48. Raborg v. Hammond, Taney and S. J. Donaldson against Meredith and Reverdy Johnson; 63 Archer v. Williamson, Taney and Scott against Mitchell and Reverdy Johnson.

[39] Tyler, p. 165.

[40] Tyler, p. 166.

[41] 1 Peters 170, McLanahan v. Universal Ins. Co.

[42] One of these was a criminal appeal from a verdict declaring a man guilty of stealing a banknote, and the others were an action in replevin dating from 1824, a case of a widow's dower (instituted in 1810), a question about a chattel mortgage, and a chancery case (instituted in 1819) involving land.

1829, that of LeGrand v. Darnell;[43] an action to determine whether a devise of land by a man to his slave, by necessary implication, gives the slave freedom. Taney represented a man who wished to buy the estate and lost the case.

Ten cases were argued by Taney in the Court of Appeals in 1829.[44] In two of these cases, he appeared for the Union Bank and in one for the State. One of these causes was a case in assumpsit, arising out of trade with the Baltic in 1810, and another concerned a more distant trade for it dealt with a cargo of goods in Chile and the powers of ship owners and of the ship captain.

In 1830, Taney appeared in one case in the Supreme Court and in seventeen in the Court of Appeals. In his Federal Case, which he lost, it was established that the United States owns the streets in the City of Washington in *fee simple* and that the original proprietors

[43] 2 H. &. G. 321 Reeside v. Fischer, Meredith against Taney; 390 Weems v. Brewer, Speed and Taney against Brewer and Magruder; 408, State v. Cassell, Taney and Gill for State. No opposing counsel; 415, Hudson v. Warner, Taney and Mitchell against Winchester; 443 Maccubbin v. Cromwell, Magruder and Taney against Mayer and Meredith.

[44] Stewart against him. 2 Peters 664. In 1829, we find him arranging with Charles Carroll of Carrollton in reference to changes in the latter's will. 13 Md. Hist. Mag. 61. Several of the cases were chancery ones, concerning obstructing and closing a road in Baltimore County, the settlement of an estate, the partition of a trust estate, a mortgage, and the deed of a *feme covert.* Two cases were concerned with insolvent debtors, nuisances were the subject of one suit. 1 G. & J. 1, Pawson v. Donnell, Williams and Taney against C. C. Harper, R. B. Magruder and Wirt; 152, Wirgman v. Mactier, Meredith and Wirt against Taney and Scott; 184 Williamson v. Carnan, Gwynn against Magruder and Taney; 231, Chamberlain v. State—a Frederick Case—Taney and Ross against Pigman; 311 Danels v. Taggart, Winchester and Wirt against Mayer and Taney; 325, Coale v. Barney, Mayer and Taney against Winchester; 346, Union Bank v. Edwards, Reverdy Johnson and Williams against Kennedy and Taney; 480, Baltimore City v. Hughes, Taney and J. Scott against Reverdy Johnson; 2 G. & J. 1, Brundige v. Poor, Moale and Williams against Winchester and Taney; 73 Winchester v. Union Bank, Reverdy Johnson and Raymond against Taney and Kennedy.

have no interest therein. In this suit, Taney was associated with Coxe, against the brilliant quartette composed of Walter Jones, Wirt, Webster, and Berrien, the Attorney General.[45] Of the cases in the Court of Appeals,[46] five were those in which Taney acted as the State's representative: against the manager of an unauthorized lottery, against one who had failed to make proper records in chancery, against a man charged with assault and intent to murder, against an insolvent, and against a delinquent tax collector. Two cases concerned the insurance on a cargo of mules and jackasses placed on a brig and lost in a storm, one was a case of trespass on land, two were chancery cases (one of them concerning the personal property of a decedent), another dealt with a judgment against an executor, and still another with the administration of an estate. A promissory note, a writ of replevin, the statute of limitations, the chartering of a vessel for a voyage to the West Indies, and the question as to whether a man had so bound himself by contract that he could not manage an opposition line

[45] Van Ness v. City of Washington, 4 Peters 232.

[46] 2 G. & J. 137, Allegre v. Md. Ins. Co., Mayer and Taney against Meredith and Wirt; 164, Chesapeake Ins. Co. v. Allegre, Same counsel; 193 Mundell v. Perry, Taney and Mundell against Stonestreet; 218, Pennington v. Gittings, Winchester and Mayer against Taney and Heath; 235 Iglehart v. Mackubin, Magruder and Shaw against Taney and Brewer; 246, State v. Scribner, Taney and Gill against Mitchell and Gwynn; 254 State v. Weyman, Taney and Boyle against Magruder and Brewer; 311 Purviance v. Barton, Reverdy Johnson against Taney; 344, Williamson v. Allen, Scott and Taney against Meredith and Raymond; 382, David v. Barney, Meredith and Taney against Reverdy Johnson and Williams; 407, State v. Walsh, Taney and Gill. No opposing counsel; 431, Karthaus v. Owings, Mayer against Taney and Reverdy Johnson; 482, Hamilton v. Warfield, Gill against Taney; 493 Glenn v. Smith, Taney and Reverdy Johnson against S. J. Donaldson and Belt; 3 G. & J. 8, State v. Dent, Taney and Gill. No opposing counsel; 12 McCormick v. Gibson, Taney and Scott. No opposing counsel; 95 State v. Scharff, Taney and Gill. No opposing counsel.

of stages from Baltimore to Washington—these were the subjects of the remaining cases.

In 1831, he was appointed as Attorney General of the United States and resigned his position as Attorney General of Maryland on July 23. In that year, Taney argued three cases in the Supreme Court and six in the Court of Appeals. In the latter tribunal, he was an attorney in an ejectment suit, in an insurance case, in two cases concerning trust estates, in a dispute concerning a lottery ticket, and in a controversey over the administration of an estate.[47]

In the Supreme Court, together with Scott, he argued against Wirt the case of Tiernan v. Jackson[48] concerning the rights of consignors and consignees of tobacco. He appeared with Stewart for the appellee and against Mayer and Wirt in the Marine Insurance case of Patapsco Insurance Co. v. Southgate[49] and, together with Wirt, he argued against Mayer and Hoffman in the case of Sheppard v. Taylor[50] which concerned seamen's wages. The rights of twenty of the sailors had been assigned to Jonathan Meredith for the Bank of the United States and twenty-one others to Thomas Ellicott for the Union Bank, and Taney brought into the case on account of his relation to that Bank.

With Taney's appointment as Attorney General of the United States he steps into the field of national

[47] 3 G. & J. 142 Thomas v. Godfrey, Reverdy Johnson against Taney; 153 Hoye v. Weaver, Anderson and Taney against Price and Yost; 163, Richardson v. Jones, Speed and Reverdy Johnson against Taney, Gibbs and Alexander; 205, City Bank v. Smith, J. I. Donaldson and Taney against Reverdy Johnson and Mayer; 320, Diffenderfer v. Winder, Dulany and Taney against Reverdy Johnson; 450 Bosley v. Chesapeake Ins. Co., Mayer, Reverdy Johnson and Taney against Glenn and Wirt.

[48] 5 Peters 585.

[49] 5 Peters 604.

[50] 5 Peters 675.

politics. John H. B. Latrobe thus describes Taney as he appeared at this time:[51] "the tall spare man of stooping form, grave and quiet bearing and gentle mien, who, careless of graces of oratory, appealed to court or jury in language so simple yet so clear that those who listened, almost fancied they could do so well themselves, so great was the grand lawyer's faculty of statement and argument."

[51] 1 Md. Hist. Mag. 118.

CHAPTER VI

Attorney General of the United States and the Struggle with the United States Bank (1831–1833)

Andrew Jackson was the staunchest of friends and had towards women somewhat of the chivalrous feelings of a knight errant, so that when some of the wives of the members of his cabinet would not exchange calls with Mrs. Eaton, the wife of the Secretary of War, the President dispensed with the services of these Secretaries. Among those whose resignations were asked was John M. Berrien, the Attorney General, a friend of Calhoun. To fill the vacancy, Taney's name was suggested by Dr. William Jones of Washington, who was a native of Montgomery County and, as early as June 14, 1831, we find that Francis Scott Key[1] had been actively and successfully at work, presenting to the President the advisability of appointing his brother-in-law.[2] On June 14, Key wrote Taney that he had held a conference with Berrien and told him that Taney "thought it desirable to the party that he should continue in the Cabinet." Berrien asked who had been talked of as a successor and Key replied, that he thought Buchanan was "more apt to be named" than any other; that Taney had been mentioned, but that Key did not believe the appointment would be offered him. Berrien asked whether Taney would take it and Key told him that it was possible Taney might do so, if he "saw a prospect of things

[1] Tyler, p. 167.

[2] 5 Md. Hist. Mag. 23 and 24. The second letter is wrongly dated in Md. Hist. Mag.

going on well." Key afterwards saw Edward Livingston and told him that he had talked with several of the President's friends, including Taney, on the subject of continuing Berrien in office. Livingston said Taney had "been talked of for the place" and Key replied that Taney had heard so, but would prefer Berrien's being continued.

On Key's return to his home in Georgetown, he found a letter from Jackson, requesting him to call at the White House and he went at once, although it was almost 9 o'clock in the evening. Jackson then told Key that he wished to offer Taney the place of Attorney General and to have Key ascertain whether the offer would be acceptable to Taney. Key replied that he knew that Taney preferred Jackson's continuing Berrien in office. The President said, at once, very decisively, that, to do this "was entirely out of the question"; whereupon Key promised to write Taney, immediately, and obtain his views. He thought that Taney would, probably, accept, because he would "feel it a duty." Jackson then said, as Key wrote Taney, "it would give pleasure to his heart to understand that you would—that he would feel gratified to have you in his counsels, that your doctrines upon the leading constitutional questions he knew to be sound and your standing in the Supreme Court he well knew."

Key urged Taney to reply promptly and not to "have any hesitation in accepting." Key continued

> I believe it is one of those instances, in which the General has acted from his own impulses and that you will find yourself, both as to him and his Cabinet, acting with men who know and value you and with whom you will have the influence you ought to have and which you can do something efficient with. As to your business, you can be as much in Balti-

more as you would find necessary, or desirable, with the understanding that you were to come over, whenever wanted. This would only be, when you were wanted at a meeting of the Cabinet or anything important; on ordinary occasions and applications for opinions from the Departments, they could send you the papers to Baltimore and you could reply from there. As to the Supreme Court, it would, of course, suit you entirely and the increase in your business there would make up well for lesser matters.

On June 16, Key learned that Taney had agreed to accept the position when tendered him. This decision "much gratified" Jackson, who sent word to Taney by Key that the Attorney Generalship need not interfere with his affairs in Baltimore and he need not even change his residence, if he did not wish[3] it. On June 21, 1831, Jackson appointed Taney to the vacant position and Edward Livingston, the Secretary of State, announced this fact to Taney on the same day.[4] Taney's acceptance is dated June 24, but some little time was needed for him to arrange affairs in Baltimore and in the Court of Appeals at Annapolis and for Berrien to arrange the business of the office in Washington. On July 20, therefore, Taney took the oath of office as Attorney General and continued to serve as such for a little over two years, until he was transferred to the Treasury Department on September 23, 1833.[5] Before he qualified in office, however, Jackson's full confidence in him was shown, in a letter written at the President's direction to Taney by W. T. Barry, the Postmaster General, on July 10.[6] In this letter Barry inquired, confidentially, if Taney would be willing to permit the War Department also

[3] In a postscript to this letter Key wrote "There is a son of Caldwell's who is Berrien's clerk, you must continue him."

[4] Tyler, p. 173. 13 Md. Hist. Mag. 162.

[5] M. L. Hinsdale's "President's Cabinet."

[6] 13 Md. Hist. Mag. 164.

"to be placed under his control" for a few days, until Governor Lewis Cass, who had been appointed as Secretary of War, should arrive in Washington. Taney replied favorably and signalized his entry into the Cabinet by holding two portfolios;[7] though the War one was not arduous, since General McComb, the commander of the army, was at the national capital.[8] It was felt to be a "notable tribute to his distinction as lawyer and his worth as a private gentleman that he was called by President Jackson to the office of Attorney General . . . . when he was known to belong to the constitutional school of which Chief Justice Marshall" was a most eminent member.[9]

From the very first days of his incumbency of office, Taney's influence with the President was recognized. James Buchanan promptly requested Taney's assistance in securing the ministry to St. Petersburg and, on August 2, 1831, Taney replied, from Washington, to the effect that he had already waited on Livingston in reference to the matter.[10] This early evidence of the friendship of the two men is interesting, when taken in connection with Buchanan's inaugural address, in its relation to the Dred Scott Case.

Bassett is right in stating that Taney soon ranked with Amos Kendall, Frank P. Blair, and Andrew J. Donelson as one of the most influential persons with Jackson and

[7] 40 Niles Register, p. 361, July 31, 1831.

[8] On August 4, 1831 Taney wrote to F. Waters Griffith, in Baltimore, declining to recommend him to Livingston for a position, feeling it unwise to interfere in the arrangements of other members of the Cabinet.

[9] J. M. Carlisle in Memorial Meeting of the Bar of the Supreme Court December 6, 1864. Tyler, p. 490.

[10] Taney regretted that he could not go with Buchanan to Saratoga and told the latter that he may soon meet Livingston in New York. II Curtis's Buchanan 133.

that he "gave a vigorous mind, with a vast capacity for work, to the destruction" of the United States Bank.[11]

Contemporary opinion is seen in the gift of the degree of LL.D. to Taney by his *alma mater*, Dickinson College, that summer[12] and by the comment upon him made by Hezekiah Niles:

> His gentlemanly deportment, honorable private character, and acknowledged talents eminently fit him for the place to which he has been appointed. He has always been an ardent and decided politician—and stood at the head of the Federal party in Maryland, so long as our political divisions were formed on old party grounds. The *Richmond Inquirer* says of Mr. Taney: "He is a lawyer of fine talents and high standing at the bar of the Supreme Court and as a politician, he is a warm friend of the Constitution of the United States in its true reading. He will carry into the Cabinet vigorous talents, sound constitutional principles and the most unblemished reputation. We shall hail his succession to the Cabinet, as a solid benefit to the Country."[13]

Niles was a little dubious as to the matter and added, "We shall see." Up to that time, the Attorney General had never been the leading politician of the Cabinet, but Taney speedily became so and delighted the Democrats, who had been doubtful what position he would take upon the great issue of the day—the recharter of the United States Bank. Thus Cambreleng wrote Van Buren, on January 4, 1832;[14] "Taney, strange as it may seem, is the best Democrat among us" and, a month later,[15] with even greater enthusiasm, he wrote Van Buren again, that Taney was the "only efficient man of sound principles in the Cabinet."

[11] Bassett's Jackson, pp. 536, 540, 608, Bassett falls into the usual blunder of calling Taney "a resolute State's rghts man," which he was not.

[12] 41 Niles Register, p. 154, October 22, 1831.

[13] 40 Register 305, July 2, 1831.

[14] Bassett's Jackson, p. 613.

[15] February 5, 1832, Bassett's Jackson, p. 608.

On the issue of nullification, he stood strongly against the rightfulness of the South Carolina doctrine, but he was in Annapolis attending court, when the famous nullification proclamation was issued by the President and had no share in its composition.[16]

Taney's Federalist antecedents caused him to support the President so sincerely in his policy in regard to nullification that, as late as the time of Taney's transfer to the Treasury Department, nearly a year after the issuance of Jackson's proclamation, Van Buren sent Taney a letter of introduction for Benjamin F. Butler, who had just been appointed Attorney General and showed in that letter anxiety lest Taney's influence should spur Jackson on to measures against South Carolina, which should appear too strong to Van Buren. The latter wrote that

> I would be the last person[17] to advise to the omission of any act, or recommendation, which is absolutely necessary to the maintenance of the Federal Government in its just acts only; but I am, at the same time, anxious that those acts and recommendations should be limited by most necessity and that all high-toned positions should be avoided as far as possible.

Taney believed that Jackson's policy was Federal and supported it as such; but he also believed in the policy of decentralization, which Jackson urged, especially in money matters. Like the President, he was a bitter enemy of the United States Bank. This hostility had begun in his experience, while he was counsel for Solomon Etting against the Bank and had been greatly increased through his connection with the Union Bank of

[16] In July 1861, he wrote that he "should have objected to some of the principles stated in it, if I had been in Washington," but did not specify his objections. Tyler, pp. 187, 189.

[17] 13 Md. Hist. Mag. 169.

Baltimore, of which he had been counsel and director and in which he was still a considerable stockholder. The president of that bank was Thomas Ellicott, a member of a well-known Baltimore Quaker family. He and Taney became "close friends," in the words of J. H. B. Latrobe.[18]

That eminent lawyer was a director of the bank from 1832 until 1837, when both he and Ellicott lost their positions therein. In his old age, Latrobe spoke of Ellicott as a "man of rare qualities, of extraordinary intelligence, and as fit to command an army, as to determine questions of bank policy." He swayed the actions of the other members of the board of directors. At this time, he was about fifty-five years of age.[19] He was six feet four inches tall, dressed in the garb of the Friends, and was a "great, thin, broadshouldered, person, with a massive, square brow, shadowing deep sunk eyes that lit up a face, whose stern determination" was emphasized by the "heavy jaw and lightly pressed lips," denoting "firmness and iron will." His complection was "pale and unhealthy." He was a frequent visitor to Taney's house and there Latrobe saw him more than once and "on these occasions," Latrobe recorded, "I know the financial affairs were the subject of conversation."

At the close of the War of 1812, the Second Bank of the United States had been incorporated and given a charter for twenty years. In Jackson's first administration, he showed his acute hostility to the Bank. In spite of that fact, in the early part of 1832, the Bank petitioned Congress to renew its charter and the bill extending the Bank's existence for a further period of fif-

[18] Semmes's "Life of Latrobe," p. 400.

[19] Born 1777, died 1859.

teen years passed Congress and was sent to Jackson in June, 1832. This early passage of the new charter was, doubtless, in large measure, devised by Henry Clay and his friends to aid Clay's candidacy for the presidency. The election came in the autumn and Clay argued that a veto would be unpopular and that a signature of the bill would be an abandonment by Jackson of his principles. Either action by Jackson would promote Clay's election. Taney's opposition to the Bank had long been known. On December 7, 1831, General Samuel Smith wrote Nicholas Biddle, the Bank's President, that Jackson was wavering and that all the Cabinet except Taney were favorable to the Bank and, on February 13, 1832, Charles J. Ingersoll wrote Biddle to the same effect.[20]

All the Cabinet except Taney advised Jackson to sign the bill. Taney, however, wrote Jackson, on June 27, from Annapolis, where he was engaged in a case before the Court of Appeals, a fifty-four page letter, urging that a veto message be sent. Jackson agreed with Taney and, on the latter's return to Washington, employed his aid in preparing the message vetoing the bill.

Taney's Annapolis letter is so important as to deserve careful consideration. He maintained that the bill was unconstitutional and inexpedient and that the present Bank was unfit to receive a new charter. A bank "is not one of the substantive ends which the government is

[20] R. C. H. Catterall, "Second Bank of the United States," pp. 219, 226. Amos Kendall wrote in his "Autobiography" (p. 392) that almost all of Jackson's supporters were Taney, Blair (the editor of the *Globe*), and its few contributors. Wm. G. Sumner believed that he traced the removal of the deposits to Kendall and Blair as the "moving spirits," with Reuben M. Whitney as a coadjutor ("Life of Jackson," p. 297). See Nicholas Biddle Correspondence, p. 183.

authorized to attain for the general welfare and, if it can constitutionally be established, it must be on the ground that it is among the *means* which Congress are permitted to use in executing the powers, specially conferred by the Constitution." Congress "can use those means only that the Constitution has in express terms authorized, that is, the means necessary and proper to obtain the end." This necessity need not be absolute, a discretion must always be exercised; for it is "impossible to draw a strict line," yet some means may be so far beyond that line that the fact may be seen without difficulty. The means granted must be "used, immediately, and directly and not remotely and by inference." The power to create carries with it the power to preserve. No tribunal can declare any of the laws void, since "Only the legislature, from the nature of the case, could decide what means are necessary and proper to obtain any legislative end." A Congress, however, cannot restrict its successors, nor can it give away, nor sell its rights. The United States Government may, within its "field of action, create a corporation;" but may alter the charter at any time after the creation. Such a corporation, chartered by Congress, must be one needed as public agent, and, therefore, must be a public, not a private, corporation. The Supreme Court, in the case of McCulloh versus Maryland, merely said that the Federal Government had the right to establish proper agents for the collection and application of the revenues. Whether the Bank is constitutional is a political question —a question which does not depend on the powers of Congress "to create a corporation, but on the powers, privileges, and immunities, which it may lawfully confer upon a public agent."[21]

[21] Tyler, p. 151. 10 Md. Hist. Mag. 24.

If Congress should create a Bank for that purpose, when one is not necessary, or confer on it peculiar powers and privileges to be used for individual emolument, beyond what its duty as a fiscal agent required, yet a judicial tribunal could not, on that ground, pronounce the act to be unconstitutional, because it is not within the province of judicial power to enter into such investigations.

Congress may make of the Bank an "institution 'appropriate' for the collection of the revenue, or the conveyance of it from place to place for public purposes;" but may not, "at the same time, give it a capital and clothe it with powers and privileges, which are not necessary to enable it to discharge its duty as a public agent and which render it altogether independent of the public will and enable a great monied aristocracy to combine together, and by concentrating their power, to exercise a baneful and corrupt influence on all the Departments of the Government." Whether such action "be called the abuse of a power granted, or the exercise of a power not granted, it would, in either case, be a violation of the Constitution." A Court could not inquire into the "degree of necessity," and there "would be manifest usurpations of power, beyond the reach of judicial corrections."

So when the proposed charter was brought before Jackson, in his "legislative capacity," he was "called on to consider whether a Bank, with the powers and privileges contemplated by the Charter, is necessary." The degree of necessity should be "the more severely scrutinized by the Legislative Branch of the Government," since the Courts cannot give this scrutiny. The proposed charter is not "justified by the Constitution, because it confers powers and privileges not necessary and surrenders, for 15 years, part of the legislative power of Congress, of which Congress cannot divest itself."

When it is proposed to reduce the public revenue to 16 million dollars annually, a capital of 35 millions is too great for the bank. The "excess gives an excess of power not justified by the Constitution."

Secondly, it is not right for the Government to agree not to establish another bank for 15 years, since the public interest may require another. "Great monied aristocracies" are to be feared. Taney curiously vitiates this part of his argument, by adding the statement that Congress cannot restrict the legislative power of its successors.

Thirdly, it is not necessary to permit Branch Banks to be established in every State, possibly without the consent of the State. The Government only, and not the Corporation, should determine where the agent to convey the revenue is needed. The Bank may wish to "establish Branches, merely for the purposes of obtaining political influence, or of making gainful speculation for private profit, in places not required by the duties of their agency for the public." To permit it to act in this manner would be unconstitutional.

Fourthly, it is not necessary that great banking powers be given to the "fiscal agent." The large bonus offered by the Bank for the charter showed that the Bank hoped for great advantages, "to be used for individual and private interest." It was contrary to the "spirit of the Constitution" to "sell for money the office of conveying the revenues from place to place." There should be "fair compensation" given for the Bank's services and no more.

Fifthly, it was an "abuse of power and a violation of the spirit of equality to select by name" a "favored body of individuals" and to "give them high and valuable privileges," from which other citizens are

excluded." If an individual, for example, Nicholas Biddle, the Bank's president, should be constituted the public agent and given all these privileges, "everyone would be shocked at such a flagrant usurpation of power." No one would think that Congress could adopt Biddle, as "their only partner," to "convey public moneys" in a "great banking speculation." But, if Congress cannot do this in favor of him, or of any other individual, how can it be done in behalf of a dozen individuals, and, if not for a small number, then not for 500 or a 1000? Congress can not "erect among us a privileged class of citizens, who are allowed to monopolize advantages which are denied to all other citizens of the United States," yet, in this bill, exclusive privileges were granted to the Bank's stockholders for their "private emolument." If these privileges may be granted for 15 years, why may not they be granted in perpetuity and hereditarily? The bonus is a sum paid by the stockholders for the charter privileges granted them by sale, for their "private and individual emolument." "More is granted, therefore, than the public service requires." No competition is allowed for the purchase of these privileges and the renewal act is, consequently, unconstitutional.

After these arguments, it is startling to find Taney continuing, with the statement that, "in examining the Constitutional questions, it will be seen that I have followed throughout the rule which I understand to be given by the Supreme Court, in the case of McCulloh versus The State of Maryland." To the ordinary reader the two lines of argument are contradictory. Taney claims they are supplementary and that the silence of the Court on other matters is "the strongest evidence that the ground taken by them was, in their opinion, the only one that could be defended."

The general welfare clause, neither "confers any new power on Congress, nor enlarges any before given." "If Congress needs more power, the people can give it, and they are the only judges competent to decide whether it is proper to be given."

Such is Taney's constitutional argument—clever, laborious, and subtle, but specious, abounding in logical fallacies and special pleading,—we should call it demagogical, if it were not addressed to one man. The agreement of students of the financial history of the United States is so complete that Taney's position was unwise and that his legal argument is unsatisfactory that it seems unnecessary to give a full statement of reasons against his position here.

Turning to the question of expediency, Taney maintained that the Charter, even if constitutional, should be disapproved, since it granted powers "so vast and overwhelming, so liable to abuse and so intimately connected with the prosperity and welfare of every portion of the United States, and indeed of every citizen, that they ought never to be intrusted to an irresponsible corporation, to be used as their private interests may dictate, regardless of the injury they may do to others." The Bank would have absolute dominion over the circulating medium of the country and could "throw pressure upon or exempt any particular place" at its will: could "bring ruin on any commercial city." Biddle answered yes, when he was asked by General Smith whether there were "few State Banks that the United States Bank might not have broken, if it had been disposed to do so." The Branches of the United States Bank are subject to the "control of the mother bank" and, consequently, the "mandate issued from the directors' room in Philadelphia may be felt at the same moment, in every part of

the United States and the blow it inflicts be too sudden and unexpected to be resisted or counteracted." Why did this "formidable political power, working through the press, seek a renewal of its charter so early? If the scheme be defeated, will the Bank consider the failure final, or will not the struggle be continued during the four remaining years of the first charter and the two subsequent years allowed thereby to settle the Bank's concerns, unless it can, in the meantime accomplish its object?" The country is on the eve of a Presidential Election and the Bank hopes that the "President will yield up the opinions heretofore expressed by him, in order to secure his election. And, if his well known firmness and independence should disappoint their wishes, they hope, by combining with the other elements of opposition, to defeat his re-election and secure a President of the United States who is favorable to their views." The present session of Congress has shown that it is inexpedient to "combine such a vast amount of separate individual interest in any of the fiscal operations of the government." If the public alone were concerned, the question could be settled without heat and excitement, but individual interests enter the situation. Biddle has been in Washington, working for the Bank. The stockholders have no rightful claim on the government, for they enjoy all their privileges during the term of the present charter. Taney thought it a simple question "whether another agent as useful and less dangerous, can not be selected to carry the public revenue from place to place."

The renewal of the charter would "give this influence such a power that the Government could not hereafter in any event, change its policy." After 15 years more of the Bank, its President would "have more influence"

than the President of the United States. "Congress could not govern the secret conclave in the directors' room; but would be in danger of being governed by it."

This part of Taney's argument is artful, shrewd, and adroit. It is addressed with skill to Jackson, but it is a melancholy proof how far prejudice and antipathy can carry an honest man—for we must never forget that Taney, like his chief, was honest.

Taney's third argument appeared to him to be sufficient of itself to cause a veto of the bill. The Bank was to pay a lump sum and then to be exempted from other taxation, National or State. The sum may be a "fair share of the public burden upon the private capital employed in the Bank," according "to the present scale of taxation;" but, in the next nineteen years, the situation of the country may be greatly changed, for "heavy burthens" may become necessary through war, and it "may be necessary to add sorely to the burthens now borne by the State Banks." "Why," asks Taney, "should not the 28 millions in the United States Bank bear its share of the public burthen in times of war and distress?" Landholders and stockholders in State Banks, "who are generally men in moderate circumstances," will pay taxes and why should the United States Bank, whose stock "is generally held by the most opulent monied men, many of them wealthy foreigners, be entirely free from the additional taxation?" The money of the citizens, employed in the State Banks, will be diminished in value, while "the money of the opulent citizens and of the wealthy foreigners" is not to be "allowed to feel the pressure which bears on the rest of the community." No other "private property in all the United States" is so protected. Of course, the government property in the Bank should be freed

from taxation; but the property of individuals in the Bank is private and should be taxed. Over this part of the argument, one sees the shadow of the tall form of Thomas Ellicott, President of the Union Bank of Baltimore.

Finally, the present corporation should not have a renewal of its charter, since: (1) other citizens ought to have an equal opportunity of obtaining these advantages; (2) the application on the eve of a Presidential election shows that the Bank designs "to influence the public servants in a great question of public concern, by exciting their fears of the political influence of this mighty engine of power"—an act which "should receive the marked disapprobation of the constituted authorities;" (3) the "funds of the Bank have been freely used for the purpose of obtaining political influence and power, and those who have been responsible for this course should receive no "new favor" as a "sanction for their conduct."

The United States Bank notes were a "public convenience" but the same convenience may be had otherwise; for it is the "pledge of Congress to receive these notes for public dues that gives them their universal character and, if the same pledge were given the notes of the most obscure State Bank, its notes would, immediately, become equally current in every part of the United States." There might be independent banks, each with a moderate capital, established at suitable places, "whose notes, with such a pledge, would be made current" and would be equally sound and general with those of the United States Bank; while these Banks would not have means of exercising the "dangerous and corrupt political influence, with which the present mammoth monopoly is able to pervade the United States." These banks would check

one another and "prevent sudden and extravagant increase of discounts and issues of paper, which the unchecked power" of the United States Bank permitted. In these words, we behold the germ of the "pet bank" scheme.

Taney concluded this remarkable document with the following sentences; "I respectfully advise that the proposed bill be not approved. And as the frank and decided course which has marked your conduct through your whole life, is, I have no doubt, not only the right one in morals, but the wisest in public affairs, I think the proposed charter ought to be met, on every ground on which you may deem it liable to objection." Jackson[22] vetoed the bill to recharter the Bank and long afterwards[23] Taney defended this action in a letter to Van Buren, which is of considerable interest, because the writer was at the time of writing the Chief Justice of the Supreme Court. Jackson "had been charged with asserting that he, as an executive officer, had a right to judge for himself whether an act of Congress was constitutional or not, and was not bound to carry it into execution, if he believed it to be unconstitutional, even if the Supreme Court decided otherwise." Taney distinguished Jackson's act as coming out of "his rights and his duty, when acting as a part of the legislative power, and not of his right or duty, as an executive officer. For, when a bill is presented to him and he is to decide whether, by his approval, it shall become a law or not, his power or duty is as purely legislative as that of a member of Congress, when he is called on to vote for, or against, a bill. If he has firmly made up his mind that the pro-

[22] Taney read and approved the veto message before it was sent in. 10 Md. Hist. Mag. 24.

[23] June 30, 1860, 10 Md. Hist. Mag. 23.

posed law is not within the powers of the general government, he may, and he ought, to vote against it, notwithstanding an opinion to the contrary has been pronounced by the Supreme Court. It is true that he may, very probably, yield up his preconceived opinions, in deference to that of the court; because it is the tribunal especially constituted to decide the question in all cases wherein it may arise and, from its organization and character, is peculiarly fitted for such inquiries. But if a member of Congress, or the President, when acting in his legislative capacity, has, upon mature consideration, made up his mind that the proposed law is a violation of that Constitution he has sworn to support, and that the Supreme Court had, in that respect, fallen into error, it is not only his right, but his duty, to refuse to aid in the passage of the proposed law." Jackson's position was not new, for every Court before which the Sedition Act was brought had sustained that law, until a "majority in Congress refused to continue the law, avowedly upon the ground that they believed it to be unconstitutional." "But General Jackson," Taney continued, "never expressed doubt as to the duty and the obligations upon him, in his executive character, to carry into execution any act of Congress regularly passed, whatever his own opinion might be of the constitutional question. And, at the time this veto message was written and sent, he was carrying into execution all the provisions of the existing charter, and continued to do so, until it expired. And, when the deposits were removed they were not withdrawn upon the ground that the charter was unconstitutional and void, but, expressly, upon the ground that it was still in force and would continue to be so, until the expiration of the term limited by the law itself."

The presidential campaign which followed Jackson's veto of the recharter was fought out largely on the issue of the continuance of the Bank, which institution entered with great energy into the contest. The result was an overwhelming victory for Jackson, who received 239 out of 288 electoral votes. Naturally, he took this as a vote of approval of his policy as to the Bank and, as Taney had been his chief adviser in the veto, Jackson "relied especially on the faithfulness and the sagacious statesmanship," of the Attorney General,[24] to use Tyler's words.

In December, 1832, Jackson sent his first message to Congress after his reëlection and startled the country, by intimating that there was some question as to the entire safety of the public deposits in the United States Bank. He recommended an inquiry into the "transactions of the institution," so as to determine whether it would be "longer a safe depository of the money of the people." He also recommended the sale of the $7,000,000 of stock in the Bank held by the United States, as well as all stock held in other joint stock companies, so as to sever the Government from all private corporations.

The House of Representatives refused to appoint a select committee to inquire into the condition of the Bank and referred the matter to the Committee of Ways and Means, which reported that it was safe to continue the deposits in the Bank. The report was adopted by a vote of 100 to 46. Latrobe maintained that the removal of the deposits from the United States

[24] Tyler, p. 191. On p. 190, Tyler tells a contemporaneous incident, illustrating Taney's kindness of heart. While going to his office on a cold morning, he saw a little negro girl shivering in the cold wind and vainly striving to fill a tin bucket with water from a pump. He took the pump handle from her, filled the bucket, and, placing it upon her head, said: "Tell whoever sent you to the pump, that it is too cold a morning to send such a little girl."

Bank and the selection of State Banks—the so-called pet banks—to receive these deposits were "promoted, if not originated," by Thomas Ellicott, and Latrobe's position was such as to make his assertion on this matter carry much weight.[25]

On March 12, Jackson had an interview with Taney on the subject of the Bank.[26] Afterwards, Jackson carefully looked into the Charter of the Bank of the United States and its Reports. That night, he sat down and wrote Taney as to the powers of the President and Secretary of Treasury over the Bank. The former, he concluded had "only power to order a *scire facias* to repeal its charter, when the facts warrant it." The latter had "the sole power" to "manage the deposits," and Jackson asked Taney merely for a written opinion concerning the violation of the charter, as "disclosed in the reports" of the Ways and Means Committee, leaving the Secretary of the Treasury to "his own deliberations as to the removal of the deposits and where to intrust them." Jackson was confirmed in his "former opinion of the incapacity of the Bank to continue specie payment for one month, after it meets the payment of the public debt;" but found that "much perplexity will occur in finding safe deposits for the public funds." This matter must be "well weighed" and Jackson wished to "see and converse" with Taney thereupon.

A week later, Jackson[27] addressed each member of the cabinet upon the subject of the Bank, requesting a "free discussion" and a reply in writing. He told them that the results of his "own reflections were: (1) that the charter of the present Bank ought not to be renewed;

[25] Semmes's Latrobe, p. 400.
[26] 4 Md. Hist. Mag. 297.
[27] 4 Md. Hist. Mag. 298.

(2) that he ought not to assent to "any bill authorizing the establishment of a Bank out of the District of Columbia;" (3) that such a Bank should be allowed to establish Branches in the different States, only with their assent and "under such restrictions as the several States may think proper to impose," that the "Government shall have the right to appoint the President and as many directors . . . . as will secure fidelity and a thorough knowledge by the proper officers of the Government of its transactions," and that "Congress should retain the right to repeal or modify the charter, from time to time;" (4) that such an institution ought not to be recommended, until a full and fair experiment has been made to carry on the fiscal affairs of the Government without a national Bank of any description; and (5) that there should be devised "a system for the deposit and distribution of the public funds, through the agency of the State, to go into operation" at a suitable future time.

After the report of the Committee on Ways and Means had been adopted, Taney wrote a 26 page letter to Jackson, on April 13, 1833, upon the subject of the "deposites," as he always spelled the word. He maintained that the question was still open, since the judgment of the House was "influential, not controlling;" that the President "must act by the dictates of his own judgment;" and that the minority report against the Bank was "correct." The ability of the Bank to meet its engagements is "not really the only point of inquiry," for the corporation[28] was created to obtain "a safe and useful agent for the Treasury Department, through

[28] Taney loved to use that word, as if it contained some subtle reflection against the bank. Nicholas Biddle (Biddle Correspondence, p. 205) "Taney is for immediate withdrawal."

which the government might more conveniently collect and distribute the revenue, according to the exigencies of the public service." Therefore, it must apply its funds according to the directions of the Government.[29] The money was not deposited for the benefit of the stockholders, but "for the safety and convenience of the Government." Consequently, the Bank must show not only capacity, but also fidelity, and must not "hide studiously" from the public "important money transactions." Taney recalled Jackson's attention to the fact that the Secretary of the Treasury, by article 16 of the Charter, had power to remove the deposits. The doctrine of the first part of the letter was novel and strained, imputing to the Bank limitations never before suggested.

Taney's second head was that the conduct of the Bank had been such that the Government could no longer rely on it, as the "agent for carrying into effect its fiscal arrangements," and that "other agents should be *forthwith provided*." The Corporation had been guilty of "gross and palpable violations of duty to the public, in matters sufficiently important to justify the Executive in withdrawing from them its confidence and placing the money of the United States in the hands of agents more worthy of the trust." As proofs of this statement, Taney alleged: (a) that in July, 1832, the government had to postpone the payment of $6,000,000 on the debt for three months, although the Bank, at that time, had nine millions of public money out at loan. The money was a deposit, not a loan, and no interest was paid, nor any consideration given for it, so that the Bank ought always to have been ready to repay the money and a

[29] Taney, like most writers of today, habitually omitted any qualifying adjective, such as Federal or National.

failure so to do at once was a "gross abuse." (b) That the great increase of loans in 1831 showed "unjustifiable overtrading." The loans increased 50 per cent in 1831 and $7,000,000 more were loaned between January and June, 1832, while the recharter bill was pending. "Charity itself cannot suggest a justifiable inducement for the flood of Bank accommodation." (c) The conduct of the Bank, in regard to the 3 per cent stocks, was enough to condemn it, for the Government Directors were not told of the transaction. (d) The money of the corporation had been employed to influence the press—a course of conduct "pregnant with so much evil that it cannot be too severely and pointedly reprobated."

Next Taney maintained that, since the Bank had "profusely lavished its money to obtain political power" in the Presidential election, i.e., to defeat Jackson, he ought not to assent to a renewal of the Charter under any circumstances, or with any modifications, "even if the constitutional objections could be surmounted."

Fourthly, the Bank was not constitutional, if the "fiscal operations" of the Government could be "carried on without it and a full and fair experiment ought to be made to prove this." A Bank would always be the "point upon which the monied aristocracy would concentrate its power."

In the fifth place, Taney considered what system should be adopted. "The one you suggest," though we fear that the suggestion was really made by Taney to Jackson and not *vice versa*,—the "State Banks, judiciously selected and arranged," will furnish a "currency, as wholesome and stable as that of the United States Bank." Jackson may well proceed to select these banks and make arrangements with them and may then discontinue deposits in the Bank of the United States,

making a report to Congress, *after* he had done so. A "fierce and desperate struggle" will be made by the Bank; but the "purity of our institutions and the best interests of our country call for prompt action and decisive measures on the part of the Executive." He may "rely for support on the intelligence and patriotism of the people." Another letter, upon the same subject, covering 15 pages, was written by Taney to Jackson on April 27. The suggested plan had difficulties, in that the Bank of the United States, through its immense capital and many Branches, would oppose the State Banks, "derange the currency, and promote individual distress." Taney took a high moral tone and said that, "if the Bank has this power, the United States ought not to expect them to use it." He asks: "Can a corporation which has received so many favors and so much indulgence from government forget the moral, legal, and political duties and injure the community it was created to serve?" I hate to say it of a man, who was in many respects admirable, but this question inevitably reminds one of Mr. Pecksniff's utterances.

The prevailing impression that the Bank will do harm is an "abundant proof, that the Corporation has, by its conduct, forfeited the confidence and esteem of the people." The Government must not count on the forbearance of the Bank. If the Bank has such power, it is "dangerous to the liberties of the country and ought not longer to be tolerated." Even if the deposits are withdrawn, the Bank must still give facilities for transferring the funds of the United States from place to place and that institution will remain at the mercy of the Government, for the removal of the deposits will not change the Charter. The fourteenth section of the Charter stated that the Government would receive

United States Bank notes in payment of dues to the United States, unless Congress voted otherwise. This "valuable privilege" was a consideration for the transfer of funds, which was an obligation of the Bank under section fifteen of the Charter. Indeed, how could the Government receive United States Bank notes at New York for the New Orleans Branch, unless the Bank agreed to the transfer of Government Funds?

Such arguments had much effect in stimulating, directing, and strengthening Jackson's purpose to injure the Bank.

In June, 1833, Edward Livingston relinquished the Secretaryship of State to become minister to France. Two months later, on board the ship *Delaware*, he wrote Taney[30] to thank him for a farewell letter and spoke in words charged with much feeling, of Taney's acquaintance, as "among the most pleasing" recollections of his cabinet career, and of his "high gratification" that he left a "favorable impression on the mind of one so well qualified to judge."

McLane, who did not favor the plan of removing the deposits, was transferred from the Department of the Treasury to that of State and his place was filled by William J. Duane, a Philadelphia lawyer.

On March 3, 1860, Taney wrote Van Buren, that[31] Andrew Stevenson, Frank P. Blair, and William B.

[30] 13 Md. Hist. Mag. 162.

[31] 10 Md. Hist. Mag. 14. Van Buren in his Autobiography (American Hist. Association Report, 1918, vol. II, p. 596, 597) states that in November 1832, Jackson was already considering changing Taney from the Attorney Generalship and that on the 26th. of that month McLane wrote Van Buren that the appointment of B. F. Butler as Attorney General would satisfy him and that he would be better satisfied could Taney go abroad—which suggests that he may have been considered for an appointment as a foreign minister. Van Buren replied to McLane (p. 598) that "I had thought of suggesting the propriety of bringing Mr. Butler into the office of Attorney General, if Mr. Taney

Lewis asked his consent to present his name to Jackson for the Treasury Department when McLane retired; but that he refused, saying that "it was one of the last offices in the government that I would willingly take." Jackson "never mentioned the subject of the vacancy in the Cabinet" in Taney's hearing, which "unusual reserve on his part rather annoyed" Taney, as was natural. When Stevenson finally told Taney that Duane was to be appointed, Taney was much surprised and wrote that he "never could understand by what influence the President was so much misled as to appoint Mr. Duane," though he supposed the suggestion came from McLane, who was rather friendly to the Bank.

Some years after Duane's removal from office he printed a volume entitled "Narrative and Correspondence concerning the Removal of the Deposites and Occurrences Connected therewith,"[32] in which book he stated that he had been invited to become Secretary of the Treasury on December 4, 1832, and had accepted the invitation on January 30. In view of these facts, it is not surprising that Jackson kept silence as to his plans. Duane was commissioned on May 29 and took

could be provided for in a manner more acceptable to himself." In September 1833, Van Buren (pp. 593 and 605) told Jackson that he had thought of Taney for the Treasury, but had not spoken of it, because McLane objected and determined to bring in Duane. Taney and McLane were rather unfriendly, as early as August 11, 1831, when the latter wrote Van Buren: "You must not ascribe it to suspicion, when I assure you that Mr. Taney *fights shy* of me. He was the only one of the Cabinet who kept off and *him I did not see, until we met yesterday at the President's in council.* We were always on good terms and I know of no cause of separation now, but his fears on a certain subject."

In later years, when Van Buren was President, he came to Baltimore to attend the funeral of General Samuel Smith. McLane and Taney were also present and Taney said, after the services, to Van Buren, "I saw that you and your old friend McLane did not recognize each other; certainly, no advance in that direction could be expected from you" (p. 613).

[32] Philadelphia, 1838.

office on the following day. On June 1, Reuben M. Whitney, at Jackson's request, called to say that the President was about to cause the removal of the deposits, that Taney and William T. Barry, the Postmaster General, had come out like men for the measure, McLane and Cass were against it and Woodbury was vacillating. Duane could not conceal his mortification at this "attempt to reduce him to a mere cipher" and resolved he would act according to his own judgment.

He was known to be opposed to the Bank, but he showed himself also opposed to the removal of the deposits and to the employment of "State Banks as fiscal agents of the Government to receive and disburse the revenue." Jackson wrote him from Boston on June 26, to the effect that he thought it desirable to appoint a "discreet agent to inquire into the practicability of making such an arrangement with the State Banks," but Duane was disinclined to do this—and wished to leave the matter to Congressional action, at the session which would begin in the following December. Jackson was not willing to wait. He went to the Ripraps off Old Point Comfort, to enjoy a summer vacation. On the morning of his departure, he discussed the Bank's affairs with Taney. Taney could not await his return, before renewing his urgency for the removal of the deposits. Accordingly, from Washington on August 5, he wrote Jackson,[33] to state "without

[33] Tyler, p. 195. Wm. G. Sumner, in his "Life of Jackson," p. 301, calls this a "sycophantic letter" and states that the removal of the deposits was unwise and unnecessary, as the charter would soon expire. D. R. Dewey "Financial History of the United States" speaks of Taney's able support and counsel to Jackson, p. 205. Van Buren in his Autobiography (Am. Hist. Ass. Report, 1918, vol. 11, p. 657) states that Jackson decided in substance, to remove the deposits three months before Taney came into the treasury. This period, assigned from memory, is too long.

reserve" his opinion on the present condition of affairs in relation to the Bank. In his previous "official letters," Taney had urged that the deposits be placed in the State Banks and he was anxious that this measure be adopted before Congress assemble, so that the members might "be among their constituents," when the decision was announced and might bring with them, when they come to Washington, "the feelings and sentiments of the people;" for Taney relied, "at all times, with confidence, on the intelligence and virtue of the people of the United States." The obstacles, which had arisen, made the course a harder one to pursue, but did not change Taney's mind in regard to it. "The continued existence of that powerful and corrupting monopoly," Taney wrote, "will be fatal to the liberties of the people" and he believed "no man but yourself is strong enough to meet and destroy it." Such flattery pleased Jackson, even when accompanied by such overdrawn statements as that, if Jackson did not remove the deposits, the Bank will be too strong for his successor. Taney was sincere, but somewhat hysterical, when he promised to "hazard much, in order to save the people of this country from the shackles which a combined monied aristocracy is seeking to fasten upon them." He "should be deeply mortified, if, after so many splendid victories, civil and military," Jackson should, in the last term of his public life, meet with defeat. With skilful art, Taney continued his argument. Jackson had spent a life of so many hazards in the public service, and Taney had "doubted whether your friends, or the country, have a right to ask you to bear the brunt of such a conflict." If Jackson had any doubts, he might await Congressional action; but Taney's "own opinion is firm in favor of the removal, as soon as the proper

arrangements can be made." Modestly, Taney added that he had "far more confidence" in Jackson's decision than in his own, and would acquiesce, if Jackson should determine not to act. Taney would, "promptly and willingly," render any service in his power, and though he should regret any change in the Cabinet and neither desired, not felt qualified to fill the chair of Secretary of the Treasury, as Jackson had suggested, he should not shrink from the responsibility, if, in Jackson's opinion, the "public exigency requires me to undertake it."

Jackson did not take long to reply to this letter, but sent his answer from the Ripraps on August 11. The epistle[34] is a long one, filled with accusations against the Bank, but the gist of it is contained in the first four paragraphs. Jackson had "perused with much pleasure" Taney's letter and was "still of opinion that the public deposits ought to be removed, provided a *more* safe depository, and as convenient for carrying on the fiscal operations of the Government, can be found in the State Banks, as is now found, in the United States Bank." It is, therefore, manifest that Jackson had not yet been entirely converted to Taney's State Bank plan.

Jackson goes on to declare that

> The United States Bank attempts to overawe us. It threatens us with the Senate and with Congress, if we remove the deposits. As to the Senate, threats of their power cannot control my course, or defeat my operations. I am regardless of its threats of rejecting my nominations. If Mr. Duane withdraws, you can, under an agency, carry on and superintend the Treasury Department until nearly the close of the next Session of Congress, before which the battle must be fought and all things settled, before your nomination would be sent in.

[34] Tyler, p. 198. 4 Md. Hist. Mag. 300.

Thus he forecast the actual course of events and he was serene. "As to the threats about Congress, it may be observed, the bank having been chartered contrary to the powers of Congress as defined by the Constitution, may find, when once the deposits are removed for *cause*, that Congress is not competent to order the deposits to be restored to this unconstitutional and corrupt depository, but must find another, and that can only be the State banks; *there is no other:* more of this when we meet." Taney's heart must have bounded with joy when he read this sentence, for it showed that but little more urging was necessary to cause Jackson to adopt the State Bank plan.

Bassett writes[35] Taney's "mental acumen can not be denied" and his pertinacity was equally marked. When Jackson returned from the Ripraps, Taney had further private conferences with him, as a result of which at Jackson's written request, made on September 15, Taney prepared a paper on the change of deposits, a step which Jackson had at last agreed to take. Jackson grimly wrote that, if "Duane will not agree to carry into effect these conclusions and remain, the sooner he withdraws, the better."[36]

On September 17, Taney had the paper ready and transmitted it to Jackson, who adopted it as his own.[37] On the same day, Taney also wrote Jackson, asking him

[35] "Life of Jackson," p. 647.

[36] McMaster's "History of United States," VI. 189.

[37] On November 30, 1833, John Quincy Adams wrote in his Diary, vol. 10, p. 41: that he heard that Van Buren said that "Taney's exposition of the reasons for removing the deposits was the greatest State paper that had been produced since the existence of the Federal Government." Adams dryly added "If Van Buren said so, it must have been because he wrote it, or a great part of it, himself." Thorpe "Statesmanship of Jackson" writes, p. 260, that, "read in connection with the history of the times," the order to remove the deposits "is seen to be a State paper of vast importance."

to name the day for changing the deposits. He would be ready on October 1, and added "I am fully prepared to go with you firmly through this business and to meet all its consequences." Jackson endorsed on this letter "to be held with my private papers, as evidence of his virtue, energy, and worth."

On the following day, the paper was read to the Cabinet, announcing the change of system and fixing on October 1, as the day when it should go into effect. After the paper was read, and was being printed in the *Globe*, the Government newspaper, William B. Lewis was concerned lest Cass and McLane, who were not so rabidly opposed to the Bank as the rest of the Cabinet, would resign, rather than be responsible for the removal of the deposits. He spoke of his fears to Frank P. Blair, the editor of the *Globe* and Blair, thereupon, showed the paper to Jackson, and told him what Lewis had said. Jackson promptly replied that he did not want anyone to be responsible for his acts and asked to have the paper read to him, which being done, he inserted a sentence assuming the sole responsibility. Blair then read the corrected copy to Taney who was puzzled, when he heard the inserted sentence. On being told the authorship of it, he replied it would be better that Cass and McLane "should leave the Cabinet than remain in it with feelings of hostility to so cardinal a measure, that it was better to encounter their hostility out of the Cabinet than in it."[38]

[38] Tyler, p. 204. Blair's account, in a letter written to Van Buren on November 13, 1859, is that Jackson at the Ripraps dictated the original of the paper, which was revised by Taney, so as to give it "a calm judicial aspect, instead of that of a combative Bulletin" (Van Buren's Autobiography, Am. Hist. Ass. Rep., 1918, vol. II, p. 607). When Blair took the printed paper to Taney's house, Donelson was present. Taney put a "segar in his mouth and his feet upon the writing table," he "prepared to enjoy his first State paper in

Taney's apprehensions were groundless, however, for both of the Secretaries just named supported the President henceforth.[39] Macdonald[40] ably discusses this paper and the situation which it created. The paper, in his opinion, was the "most explicit statement we have of Jackson's theory regarding the status and function of a cabinet officer in our constitutional system. In his view, the head of a department is the agent, through whom the President acts in matters relating to that department. As such, he may properly hold and express an independent opinion on any questions regarding which his advice is sought. The President, however, is the responsible head of the administration and the acts of the cabinet are his acts. In the event, accordingly, of an irreconcilable difference of opinion between the President and his Cabinet, the will of the President must prevail and, if the Cabinet officer cannot submit, he should resign and may be removed. The fact that the Secretary of the Treasury was required by law to report to Congress, instead of to the President, did not, in Jackson's opinion, exempt him from the obligation to support the President in matters of public policy. Whatever the circumstances of this particular case may have been, the doctrine was sound constitutional law and is neither dictatorial nor imperialistic. How far the thing was originally Jackson's own cannot be determined. Taney was, undoubtedly, Jackson's principal

print." He said to Donelson: "Now, Mr. Secretary, let us hear how it reads for the public." When Donelson came to the responsibility passage, Taney interrupted him, saying: "How under heaven did that get in?" Blair told him and Taney replied "This has saved Cass and McLane. But for it, they would have gone out and been ruined,—as it is they will remain and do us much mischief."

[39] See 10 Md Hist. Mag. 16 for Taney's distrust of McLane.

[40] "Jacksonian Democracy" in American Nation Series, pp. 227–236.

adviser at this time, but the President's adoption of Taney's statement of it made it his own." With this summing up of the case, the verdict of history has agreed as it has also agreed with Macdonald's further conclusion that, "in directing the removal of the deposits, Jackson undoubtedly acted within his naked rights as executive head of the Government, though for the action, from any other point of view, there can be little save condemnation."

On the next day,[41] Jackson wrote Van Buren: "Mr. Taney is a sterling man. You would have been delighted with him, had you been present." Ten days later, he wrote again, "Mr Taney is a host. His energy, combined with his clear views, will enable him to carry into effect the change" in the deposits. Duane refused to execute this order or to resign, and, on the 23rd of September, Jackson removed him from office and bluntly wrote Taney: "Having informed William J. Duane, Esq., this morning that I have no further use for his services as Secretary of the Treasury of the United States, I hereby appoint you Secretary in his stead, and hope you will accept the same and enter upon the duties thereof henceforth, so that no injury may accrue to the public service."[42] Taney's acceptance has not been found; but, on the succeeding day, he entered upon the duties of the office.

Taney's first appearance before the Supreme Court as Attorney General occurred on January 7, 1832, and he appeared at two terms of that Court in thirty-one cases, while holding that office. Of these cases, eight were in his private practice[43] and some of these cases were impor-

[41] 10 Md. Hist. Mag. 15.

[42] Tyler, p. 205, 4 Md. Hist. Mag. 302.

[43] (1) Oliver v. Alexander, 6 Peters 143, Action of Case. Hoffman against Wirt and Taney; (2) Conard v. Pacific Insurance Co., 6 Peters 262, Taney

tant ones. His incessant industry is shown by his large practice at this time. On February 10, 1833, Mr. Justice Story wrote Judge Fay[44] of hearing "fine arguments from Attorney General Taney."

Taney's official opinions occupy nearly 100 pages of the first volume of the Opinions of the Attorney General.[45] They cover all sorts of cases.[46] Some dia-

against Ogden and Sergeant; (3) Gassico v. Ballon. 6 Peters, 760—averment of citizenship—Taney against Key; (4) Strother v. Lucas, 6 Peters 763, Taney and Benton against Wirt; (5) Douglass v. Reynolds, 7 Peters 113—a guarantee case—Jones against Taney, (6) Barron v. Baltimore 7 Peters 263. Mayer against Taney and Scott—stopped by the Court—The Fifth Amendment to the Federal Constitution limits the United States not the State; (7) Livingston's Lessee v. Moore 7 Peters 469,—ejectment—Ingersoll and Taney against Binney and Sergeant; (8) Scholefield v. Eichelberger 7 Peters 586,—illegal contract during the War of 1812, Donaldson and Taney against Reverdy Johnson and Magruder.

[44] II Story's Story 122.

[45] Pp. 777–868. Berrien's last opinion is dated April 2 and Taney's first July 28, 1831. His last is dated September 20, 1833

[46] Criminal cases constituted 4 of those argued for the National Government: two of which were for robberies of the mail (U. S. v. Mills, 7 Peters 164 and U. S. v. Wilson, 7 Peters 150), and two for forgery (U. S. v. Brewster 7 Peters 164, U. S. v. Abel Turner, 7 Peters 132). In one of the latter cases it was decided that, under the Charter of the Bank of the United States, a person purporting to issue a false bill is liable to indictment, if the persons whose signatures were forged, were not in the Bank as officers. Taney lost the case of Tobias Watkins, who charged that he had suffered illegal imprisonment (7 Peters 568. Brent and Coxe were opposing counsel). Two cases involved the seizure of sugar imported (Barlow v. U. S. 7 Peters 404. Morton and Ogden were against Taney, U. S. v. 84 Boxes of Sugar, 7 Peters 453. Mayer was opposing counsel). Official bonds were involved in three cases (Cox v. U. S. 6 Peters 172. Bond of a Naval Agent in Louisiana. Johnston was opposing counsel and won. Ex parte Davenport, 6 Peters 661, Mandamus in suit on custom house bond. Taney defeated Hall as counsel. Duncan v. U. S., 7 Peters 435. Ingersoll was against Taney. Bond of a paymaster). Claims of officers for payment for services were the subjects of three cases (U. S. v. McDaniel, 7 Peters 1, Department Clerk, Taney against Coxe and Jones; U. S. v. Ripley, 7 Peters 18, Military Officer; U. S. v. Fillebrown, 7 Peters 28, Secretary of a Navy Board, Taney against Coxe and Jones). There was one action of account (Du Bourg v. U. S., 7 Peters 625. Livingston was opposing counsel and won), while one case involved the priority of the United States in

monds had been stolen from the Princess of Orange and brought to this country. Taney held that, as we had no extradition treaty with Holland, the President would not be justified in surrendering the alleged criminal;[47] that the custody of the jewels lay in the United States Court and not in the Collector, although the latter might hold them physically as the Court's servant;[48] that these jewels, brought to the United States without the consent of the owner[49] stand upon the same footing as property cast upon our shores by violence of wind and waves and are entitled to the same protection. There was sufficient evidence that the jewels belonged to the Princess and they should be delivered to her, while they were not liable to condemnation.[50] Courts receive control over property seized by a collector, only when a libel is brought against it[51] and when the prosecution is

the payment of debts (U. S. v. State Bank of North Carolina, 6 Peters 29. Taney against Peters) and in 2 cases questions of procedure (U. S. v. Nourse, 6 Peters 470. Coxe and Sergeant defeat Swann and Taney on a question of appeals) or of jurisdiction (Sampeyreau v. U. S., 7 Peters 222. Prentiss and White opposed Fulton and Taney, Powers of a court in Arkansas, U. S. v. McDaniel, 6 Peters 634. Coxe opposed Taney) were considered. Claims for land in Florida caused two cases (U. S. v. Arredondo, 6 Peters 691. Call Wirt and Taney against White, Berrien and Webster, U S. v. Bucheman, 7 Peters 51, Taney opposed to White), while the forfeiture of a vessel during the war of 1812 (Jones and Sergeant were against Taney and won McLane v. U. S. 6 Peters 404), and a question of neutrality caused two more (U. S. v. Reyburn, 6 Peters 352. Wirt and Williams, District Attorney for Maryland, lost to McMahon and Gleem. Taney was not of counsel).

[47] Page 778, so in a case of a man claimed as a criminal by Portugal p. 849.

[48] Page 794.

[49] Page 798.

[50] The President should act not under the power to grant reprieves, but under that to see that the laws were faithfully executed. He had the right to discontinue a suit, brought in the name of the United States, by giving orders to the District Attorney, as an attorney might discontinue a suit for a client. The District Attorneys were wholly different from the courts, which were independent of the Executive.

[51] Page 807.

discontinued, the Collector is again legally entitled to keep the property.[52]

Taney said that the Attorney General had no duty to give opinions except in cases defined by the laws[53] and he held that he ought not to mark out the limits of the legislative power, nor to express an opinion as to whether Congress had power to review a sentence of a Court Martial. On the vexed question of the power of Congress over treaties, however, he took high ground and held[54] that, by treaty with Spain, the Department of State was the depository for certain records and these must not be delivered to claimants, in spite of a law of Congress violating the treaty and authorizing such delivery.

The minister to Spain was not legally allowed to charge for office rent though equitably entitled to it.[55] The United States ought to make good damages and costs incurred, through fault of the Government, by the chargé d'affaires to Peru from the nonacceptance of a bill of exchange drawn by him.[56] These two decisions clearly show the niggardly policy of the United States in foreign affairs.

The Patent Office was then under the Department of State and Taney held that the office acted ministerially rather than judicially, since the rights secured by letters patent were subjects of judicial and not of executive decision.[57]

[52] The Court might be moved to order the marshal to deliver the jewels to the Dutch minister.

[53] Page 830.

[54] Page 819.

[55] Page 778.

[56] Page 813.

[57] Page 779. Other opinions as to Patents are found on pp. 857 and 858 and on p. 817, where Taney held that an applicant for a patent must prove citizenship and residence in the United States for two years.

An interesting question decided by Taney[58] involved the right of property of a British master in slaves placed on board vessels trading to the United States. He held that the right depended upon the laws of the State, where the slaves were found. If they claim freedom in a free State, the United States were under no obligation to return them, especially since Great Britain does not recognize the possibility of slavery in her territory and, therefore, no question of mutuality is involved, nor does the treaty between the two countries speak of slavery *expressly*. He thought that, probably, the United States could not, in any case, by treaty, control the several States in the exercise of the power to free slaves.[59]

[58] Page 793.

[59] The Treasury Department was told that it was not the proper forum (p. 781) for relief to a surety on a bond (in an opinion to the Department of State, p. 810, Taney held that the bond of a marshal must be executed with a new commission) who had paid money to the United States; but that, as the matter was one of chancery, it belonged to the Courts. Insolvent debtors were the subjects of several opinions (pp. 777, 782, when a debtor was discharged, the Federal Government was not liable for the marshal's fees, p. 845). Other opinions given to the Treasury Department concerned the commutation of pay of Revolutionary officers of the Virginia line (p. 847) and held that the President had no power (p. 867) to order sale of a square in New Orleans (see U. S. v. Tingey, 5 Peters 127).

Taney doubted the power of a Secretary of War to review his predecessor's opinion (p. 785) and held that an accounting officer may allow interest on a claim. Lapse of time, though strong presumptive evidence against the justice of a claim, is no absolute bar to its payment. Bounty land for soldiers of the War of 1812 (pp. 789, 810, 813, 833, 863), pensions to invalid soldiers (pension to indigent person to be withdrawn when he has acquired enough property to support him, p. 795, 811; President may exclude a civil officer from the list of invalid pensioners, 822; persons serving on privateers were not included in the pension law, vide pp. 820, 836, 855, 856), payment of the militia of Missouri, Illinois and Michigan when called out to serve against the Indians (pp. 834, 841), compensation for horses lost in the service (p. 857), the pay of the Chief of the Engineer Corps (p. 850), a payment under the Ottawa treaty (p. 851), title to the Pottawatomie Reservation (p. 868, his last opinion) were among the subjects on which Taney gave opinions to the Secretary of War (Taney held that a law, directing an account to be reopened for a specific purpose should be

The Norfolk Drawbridge Company, without the consent of the legislature of Virginia, had no power to execute a contract to the United States so as to surrender its rights to the bridge and the road leading thereto,[60] nor could it otherwise extinguish the rights of the public therein. "An act of incorporation of this description can never be considered as having been granted for the exclusive benefit of the corporators. Certain privileges are given to them, in order to obtain a public convenience, and the interest of the public must, I presume, always be regarded as the main object of every charter for a toll bridge, or a turnpike road. The exclusive privileges are not given to the corporators, merely for individual emolument, or from favoritism, but are granted as a compensation for the public convenience, derived or expected to be derived, from the work done by them and are offered in the charter as inducements to individuals to undertake it. And this must especially

strictly construed, p. 820, and that payment for building material at Fort Monroe could not be made, until the contracts had been deposited with the Comptroller and the accounts adjusted in the Treasury). The Army might remove by force, on direction of the President, intruders from the Creek reservation, whether or not it lie within a State (p. 860. An opinion given the Commissioners of the Land Office determined questions concerning land claimed by the Miamies and concerning the treaty with that tribe of Indians).

Though the sum involved were small, Taney gave the subject attention, if the principle were important, and held that, when a contract had been made for the return of a discharged seaman who only came part way back; the Captain could only recover for the distance the seaman returned (p. 788). Among minor opinions given the Navy Department are these: holding that the oaths (p. 783) of members of Courts Martial need to be taken only once (on the number composing Courts Martial, p. 832), concerning proceedings to punish the cutting of live oak (p. 805), treating of the duties and positions of the Board of Navy Commissioners (p. 811), and deciding that a widow can not be compelled to refund moneys erroneously paid her, since she is not a debtor to the public, for what she may have erroneously received under decisions of the tribunals established to decide on her rights (pp. 831, 838, 840, on a disabled officer's pensions, p. 842. Widows' pensions are not to be paid after remarriage).

[60] Page 818.

be the case in a charter like this, where the power of the eminent domain is exercised in taking the property of individuals, without their consent, in order to make the contemplated work." This is sound doctrine and foreshadows Taney's decision in the Charles River Bridge Case.[61]

To the District Attorneys, Taney gave several opinions. If a man took slaves in 1831 to Texas, outside of the limits of the United States, expecting to establish a domicile there and not as a sojourner, he may not bring these slaves back, although he may have changed his mind within a few weeks.[62] A United States Judge in Virginia[63] may issue a warrant to arrest a man[64] for an assault committed upon the President of the United States within the District of Columbia and the warrant will run throughout the United States.

The opinions given to the President were quite numerous.[65] During the recess of the Senate, the

[61] Vide p. 842.

[62] Page 796. An opinion on p. 826 deals with prosecution of persons taking live oak ship timber from the public lands.

[63] Page 853. Opinion to F. S. Key, District Attorney for District of Columbia.

[64] R. B. Randolph.

[65] Two of these opinions dealt with Indian questions: the right of Choctaws who prefer to remain in the East to become citizens of the United States (p. 784) and the power of the President to sell the Choctaw lands (p. 786). The salary of the Surveyor for the City of Washington (p. 791), counsel fees in a case in the District of Columbia (p. 806), the grading of streets in Washington (p. 837), the pay of clerks of the Board of Navy Commissioners (p. 865) received Taney's attention. He held that there was no warrant in law to pay a Foreign Minister, or a Consul, his salary for a quarter of a year after his recall, and that this salary should be paid him, only when he is abroad, so as to allow him to return home (p. 790); that a widow of a consul who died in office might receive a quarter's salary; that if the consul's son remained at the port and discharged the duties of the office, he may receive the compensation and that the funeral expenses of a consul were a fair charge on the contingent fund (p. 824); that the duties of accounting officers were not judicial (p. 792, vide p. 797); and that a decision of the Comptroller concerning an

President had power to fill vacancies[66] which exist in subordinate offices and was not limited to those vacancies which occur in the recess. It was the intention of the Constitution that the offices created by law and which are necessary to the current operations of the Government should always be full and, when vacancies occur, they shall not be protracted beyond the time necessary for the President to fill them. "The Constitution was framed for practical purposes and a construction that defeats the very object of the grant of power cannot be the true one." If a nomination is not confirmed by the Senate, the commission expired at the end of the Session and, therefore, a vacancy was anew created. "Vacancies are not designedly to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate." The Constitution uses the word "happen" of vacancies, and that shows that accidental ones were contemplated.

Taney's last opinion given to the President was dated on September 21, 1833, and was to the effect that the Secretary of the Treasury might take security from State Banks for the deposit of National funds.

In addition to his political and official activity, Taney found time, as we have already seen, to carry on his practice before the Court of Appeals at Annapolis.

account is conclusive on the Executive Branch (p. 815) of the Government, the President having no power to enter into the correctness of the account. General Zachary Taylor had been sued as a result of an accounting. The President might direct the District Attorney to expedite the suit, but Taylor must seek relief from the judgment of the Court in an act of Congress (vide also p. 839).

Taney also considered a grant of lands to Ohio for the Miami Canal (p. 843) and of public lands to Arkansas (p. 862).

[66] Page 826.

In 1832, he won a case involving a guardianship[67] and lost a chancery case.[68] He was one of the Railroad counsel, although not one of those who argued, in that year, the great case of the Chesapeake and Ohio Canal Company versus the Baltimore and Ohio Railroad Company. He took a keen interest in the case.[69] Walter Jones and A. C. Magruder appeared, in the Court of Appeals, for the Canal Company, Daniel Webster and Reverdy Johnson were counsel for the Railroad Company, which won the case in the Chancery Court below. The question involved the priority of a right of way along the Potomac River upon the north bank, west of Harper's Ferry. Taney had been interested in the Railroad for some time and had gone in a party, with J. H. B. Latrobe and others, in 1830 to inspect the track through the gorge of the Patapsco River.[70] When the decision was rendered in the Court of Appeals in favor of the Canal Company by three judges out of five present, the sixth judge being absent, Taney felt so strongly in the matter that he wrote Latrobe, on January 6, 1832: "It is difficult to write to you on the subject, without saying what I think about the conduct of the three judges who were determined to decide the case against us, while one was absent." It will be remembered that the decision below was for the Railroad and that, if the Court of Appeals had been evenly divided, that decision would have been confirmed.

[67] Jarrett v. Stump, appeal from Harford County, 5 Gill and Johnson 27. Case instituted 1827—C. W. S. Dorsey and Reverdy Johnson opposed Gill and Taney as counsel.

[68] Chambers v. Chalmers, 4 Gill and Johnson 420. Dulany and Reverdy Johnson opposed Taney and Mayer.

[69] 4 Gill and Johnson 1.

[70] Semmes's Latrobe, pp. 332, 343, 344.

A month later, Taney's resentment had not softened and, on February 7, he wrote Latrobe again that the judges; "by an act of mere despotic power," have decided, "without taking time to think of it and without having made up their minds what reasons are to be given for it."

In 1833, Taney argued four cases before the Court of Appeals, three of which he won. The one lost concerned a covenant to put up a steam engine[71] while those he won concerned a chattel mortgage,[72] an alleged fraudulent conveyance[73] in Frederick County, and a condemnation by a foreign prize court of a vessel on a voyage to Colombia in 1822, which vessel thereby became a total loss to its owners.[74] In this last case, an imposing array of counsel were engaged, viz., R. B. Magruder, Purviance Meredith, Martin, and Wirt against Taney, Reverdy Johnson, and Glenn.

Taney also had some office practice, in the course of which he wrote an opinion, on September 5, 1833, on the validity of the law of New Jersey under which the Camden and Amboy Railroad and the Delaware and Raritan Canal Company obtained a monopoly of a transportation route. This opinion, which was printed in *Niles' Register* on the subsequent second of November[75] is especially important, in view of Taney's later opinion in the Charles River Case and it is interesting to learn[76] that the attorneys for the old bridge,

[71] Watchman v. Crook, 5 Gill and Johnson 239. Gill and Taney against Reverdy Johnson and Evans.

[72] Clagett v. Sulman, 5 Gill and Johnson 314. Alexander and Taney opposed Reverdy Johnson and Mayer.

[73] Birely v. Staley, 5 Gill and Johnson 433. Taney, Palmer and Duckett opposed William Schley and F. A. Schley.

[74] Maryland Insurance Company v. Bathurst, 5 Gill and Johnson 159.

[75] 45 Niles Reg. 150.

[76] Thayer's Select Cases in Constitutional Law, note on that case.

against which the decision of the Court was made and Taney's opinion was written, were in possession of this opinion and knew that they had to combat it.

Taney began, by admitting that it was too well settled to be disputed that a charter can not be altered by a State Legislature. Had the Legislature, however, the power, in this case, to make the contract, or is it an *ultra vires* one? There was no clause in the New Jersey Constitution, which gave the power specifically, and, if it existed, it must be regarded as inherent in the legislative power, unless prohibited to the Legislature. The Charter of the Bank of the United States endeavored to establish such a monopoly; but, Taney wrote,

> I cannot think that a legislative body, holding a limited authority under a written constitution can, by contract or otherwise, limit the legislative power of their successors. . . . . If they can deprive the successors of the power of chartering companies of a particular description, or in particular places, it is obvious that, upon the same principle, they might deprive them of the power of chartering any corporations, for any purpose whatever, and, if they might, by contract or otherwise, deprive their successors of this legislative power, they could surrender any other legislative power whatever, in the same manner, and bind the State forever to submit to it. The existence of such a power in a representative body has no foundation in reason, or in public convenience, and is inconsistent with the principles upon which all our political institutions are founded. For, if a legislative body may thus restrict the powers of its successors, a single improvident act of legislature may entail lasting and incalculable evils on the people of a State.

Where power has been expressly delegated to the legislature, of course, it binds the State in the exercise of that power; but "it is not at all essential to the exercise of the power to create corporations that an agreement

should be made not to charter other corporations which may rival it in trade."

"The charter for a railroad from Trenton to New Brunswick," Taney concluded, "would not be inconsistent with the capacities and franchises granted to the present united canal and railroad companies. They would still exercise and enjoy them, though they would prove less profitable."

Finally, he said that the "principles of moral justice would, undoubtedly, in many cases, require that the State should indemnify a party who had confided in the public agents and had mistaken their power," but further than this, even "moral justice" would not go.

CHAPTER VII

Secretary of the United States Treasury (1833–1834)

On September 23, 1833, Taney became Secretary of the Treasury, and continued to hold that portfolio, until his nomination thereto was rejected by the United States Senate, on June 24, 1834, by a vote of 28 to 18. He resigned on the following day, choosing not to await the end of the Session, as he might have done under the provisions of the United States Constitution.[1] He was the first Cabinet officer whose nomination had been rejected by the Senate,[2] and the rejection shows how bitter had become the fight into which he had plunged.

When Taney was appointed, John Quincy Adams wrote in his diary[3] "Upon all which I take time for reflection," but very few others did so. Taney appreciated fully the gravity of the situation. Amos Kendall's memory doubtless heightened the color of Taney's words,[4] but there must have been some measure of truth in his report of what Taney said to him on being urged to accept the succession to Duane:

> I have, as one of the President's constitutional counsellors, advised him to cause the public deposits to be removed from the Bank of the United States, and he proposes to act in accordance with my advice. I, therefore, feel bound in honor to aid and sustain him in any position which he may think proper to assign to

[1] Hinsdale, "President's Cabinet".

[2] J. F. Essary "Maryland in National Politics," p. 168.

[3] Vol. 10, p. 17, p. 48, December 8. He read the papers concerning the removal of Deposits, but made no comment.

[4] Kendall's Autobiography, p. 386.

me. But [raising his hands to heaven] in doing so, I give up the most cherished object of my life. I am not a politician and have never sought political office. The summit of my ambition has been a seat on the Bench of the United States Supreme Court, and that desire I surrender—accepting the Treasury Department now.[5]

Not only had he excited the hatred of the Bank's friends; but, what must have been far more galling to him, then, and for long years afterwards, he was regarded by many as Jackson's tool and instrument, instead of being, as was really the case, a most active instigator, suggestor, and initiator of Jackson's acts. As late as April 18, 1839, John Quincy Adams, who had been in Washington throughout the fight about the Bank, wrote in his diary,[6] after reading Duane's book, that Taney was a "supple and submissive assentator" to Jackson. Of later years, a more accurate view has prevailed, and von Holst[7] wrote that Taney was "not a pliant tool, nor one that acted through selfish motives." . . . . He fully shared Jackson's opinion concerning the Bank, and even seems to have urged the removal before Jackson decided it."[8] In the remarks which Reverdy Johnson made after Taney's death,[9] he stated that, for some years before Taney's appointment to the Bench, the two men were "on the most intimate terms," and Johnson "possessed Taney's confidence." Taney often conversed with Johnson "on all the political topics of the

[5] Kendall said (p. 388), that Taney asked him to become President of the Bank of the Metropolis—the deposit bank in Washington—and act as superintendent of the new system through that bank.

[6] Vol. 10, 115.

[7] Constitutional History of the United States, II 65.

[8] Taney wrote Van Buren on June 30, 1860, an interesting letter upon the misconduct of Biddle and the Bank, 10 Md. Hist. Mag. 22.

[9] Tyler p. 496.

day, and, amongst others frequently, of the character, tendency, and actual condition of the Bank." At that time, he did not anticipate being called into Jackson's cabinet, and, to use Johnson's words, "he over and over expressed to me his convictions that the Bank, as he thought it was administered, was dangerous to the true interests of the country, because, he said, it was being used for party political purposes. . . . . He, therefore, considered it to be the duty and the interest of the government (the charter clearly giving the power), to remove the public money from its custody, and said, that if the authority was with him, he would lose no time in exercising it." When, therefore, he was appointed Secretary of the Treasury, the order which he gave "was but the carrying out of a measure which he had long deemed—whether correctly or not is immaterial—to be important to the public good. . . . . If influence, therefore, was exerted at all in relation to the measure, it was the influence of Taney on Jackson, and not of Jackson on Taney. . . . . He was said to have been an instrument; when, on the contrary, his was the mind that determined upon and adopted the measure."

Taney had taken office, so as to carry out the policy of ceasing to place the deposit of public moneys in the United States Bank, drawing out what had already been placed there, according to the needs of the Government, and depositing these funds, in the future, in selected State banks—the so called "pet banks." Only men blinded with prejudice, or self-interest, could have supported the plan. Parton, an ardent admirer of Jackson, is forced to condemn the project[10] exclaiming: "What a simple, what a harmless measure this appears!

[10] Life of Jackson III, p. 499.

And harmless it would have been: but for one lamentable circumstance. The government had not devised a proper place to which to transfer the public money."[11]

There was another difficulty in Taney's case. Though the standard of public honor had not then been made that which Caesar proclaimed concerning his wife to be above suspicion, yet even then there was some feeling concerning the impropriety of Taney's selection of the Union Bank of Maryland as one of the banks to receive the public deposits. Taney had been counsel for, and director of this bank, and was a stockholder in it, at the time he selected it as a government depository.[12]

Before long, Taney's faith in his friend, Thomas Ellicott, the President of that Bank, was rudely shattered.[13] Taney feared that the United States Bank would attempt to injure the deposit banks, by calling them to pay balances due, and, to offset this demand, he placed large drafts on the Bank of the United States in the deposit banks at New York, Philadelphia, and Baltimore, with the understanding that these drafts should not be used otherwise. The Bank of the United States took no steps to hurt the deposit banks; but, contrary to Taney's instructions, a few days after the new system had gone into operation, the Union Bank cashed a draft on the United States Bank for $100,000. Before there was time for any explanation, the other one given the Union Bank for the same amount, was cashed likewise.[14] The money was used in stock specu-

[11] Parton believed the measure first occurred to Jackson early in 1833, while engaged in conversation with Frank P. Blair.

[12] Sumner's Jackson p. 307 states that he sold his stock on February 18, 1834. When Niles's Register for September 28, vol. 45, p. 65, announced Taney's appointment, it added that it was understood that the Union Bank of Maryland would obtain the deposits in Baltimore.

[13] Sumner's Jackson, 307, Kendall's Autobiography, 392.

[14] Kendall p. 392 states that Taney privately told the deposit banks not to lend money to the Post Office Department.

lation, and no satisfactory response was made to Taney's inquiry as to the matter. Then he asked Ellicott to come to Washington and explain his conduct. Kendall was with Taney, when Ellicott arrived, and listened to his "stammering explanation." He virtually admitted the use of the money for stock speculations, when taxed with this by Kendall. Taney "was annoyed the more," because Ellicott was "his friend and special adviser in financial matters," and because an exposure of him would "put a powerful weapon into the hands of the enemy." Consequently, he dismissed him, with a reprimand, and merely refused him more money in the future, but Congress found out the transaction after all, and investigated it.

As late as May 23, 1834, however, we find a copy of a letter from Taney to Ellicott.[15] It seems that Taney had a conversation with Ellicott, on the previous Sunday, and had since received two letters from him. For unnamed reasons, Ellicott, of whom Taney speaks as "among my oldest and most confidential friends," and as "one of my oldest and most trusted friends," had become so alarmed at the "power of the Bank of the United States to do mischief," that, by an astonishing right about face, he actually recommended a recharter of the Bank. Taney, as ever, believed that this was a "struggle for the liberties of the country, and that, if the Bank triumphs, the Government passes into the hands of a great monied corporation." To advocate the renewal of the charter, would be "the betrayal of the best and dearest interests of the country and would justly cover" Taney's "name with dishonor." Ellicott

[15] 5 Md. Hist. Mag. 35, prints this letter, the manuscript of which is distinctly marked by Taney as a copy of one sent to Ellicott, but the editor conjectures that it was written to Biddle, which the contents show to be impossible.

had said that there was a desire in Washington to withdraw the deposits from the Union Bank, on account of loss of confidence in him. Taney denied this, and said that "they will be cheerfully continued there, as long as it is believed to be a safe depositary." Taney was serenely sure that, in the long run, "the efforts of the Bank to ruin the country will be comparatively harmless."

The administration's unsound financial policy caused great distress throughout the country, and a terrible panic ensued, accompanied with widespread financial ruin.[16] These things did not shake Jackson's, nor Taney's, determination; but they brought to Washington, in December, a Congress in which the Whig majority of the Senate was almost foaming with rage. Jackson's message[17] told Congress that "the Secretary of the Treasury has directed the money of the United States to be deposited in certain State Banks, designated by him, and he will, immediately, lay before you his reasons for this direction. I concur with him, entirely, in the

[16] Among Taney's correspondence of the period, are found two letters of some interest, printed in 13 Md. Hist. Mag. 161 and 164, written to Taney by Jackson and Andrew Stevenson. Jackson enclosed a note from Moses Dawson of Cincinnati, asking for the names of holders of government "stock," that he might endeavor to induce them to sell it and lend him the money "at a more advantageous rate of interest!" while Stevenson told of Mr. Daniel's refusal of office, and requested that Mr. Price, whom Duane had forced to resign from a position in the Treasury Department, might be reinstated. The Jackson papers contain two letters dated December 20: one from Jackson to Taney about the Potomac Bridge, and one from Taney to Loammi Baldwin, Superintendent of the Dry Dock at Norfolk, requesting him to come to Washington for a conference over the bridge. Two long and interesting letters from Key, written from Alabama, in November, 1833, and treating of the strength of the Nullifiers there and of Indian affairs are printed in 5 Md. Hist. Mag. at pp. 27 & ff.

[17] In 5 Md. Hist. Mag. 32 is printed a letter from Van Buren to Taney discussing this message.

view he has taken of the subject, and, some months before the removal, I urged upon the department the propriety of taking that step." When Jackson suggested this step to Duane, upon June 1, he was actuated by the "near approach of the day on which the charter will expire, as well as the conduct of the Bank;" but, late in August, he received from the Government Directors, a report, "establishing beyond question," that the Bank had been active in politics and had "placed its funds at the disposal of its president, to be employed in sustaining the political power of the Bank." Jackson then felt, as he told Congress, that the Secretary of the Treasury, the only officer who could remove the deposits in accordance with the terms of the charter, ought at once to exert his power, "to deprive that great corporation of the support and countenance of the Government, in such a use of the funds and such an exertion of its power."

On the next day, Taney's report was in the hands of Congress.[18] He began, by stating that, in pursuance of the power given him by the Charter of the Bank, he had "directed that the deposits of the money of the United States shall not be made" in the Bank. The Charter was a contract, and vested power to withdraw the deposits in the Secretary of the Treasury, "whenever the change would, in any degree, promote the public interest. It was not necessary that the deposits should be unsafe

[18] Senate Docs. 23rd Cong. 1st Session pp. 1–41. Van Buren in his Autobiography (Am. Hist. Ass. Rep. 1918 vol. II, p. 654) wrote, praising the report for "the clearness, the distinctness, and the obvious freedom from either reserve or passion which characterize its statement of the facts that belong to the case and the irrefragible proofs it deduces from them that the acts imputed to the bank were voluntary" and intended. He refers to Taney (p. 364) as "accomplished and upright." The relations between the two men were close (p. 511)

in order to justify their removal." Taney considered that the "general interest and convenience of the people must regulate his conduct." The reasons he assigned for his action were these: 1. The Bank's charter will not be renewed, and, consequently, Taney must make arrangements, before March 1836, for the deposits—a date nearly two and one-half years away. A "serious inconvenience" would result, if a large sum were left in the Bank until the last day. The Bank should be forced to call in its notes, and suffer those of the State Banks to take their place. The time "which remained for the charter to run" was "not more than was proper to accomplish the object" of withdrawing these notes with safety to the community. "If it had depended" upon Taney's "judgment," the deposits would have been withdrawn "at an earlier period." "I should have preferred," he wrote, "and should have taken a longer time." After the last Presidential election, the Bank diminished its discounts, thus injuring the people. The conduct of the Bank left Taney no choice as to delay action, until Congress met (as he stated he would have preferred).[19] "If the measure had been then suspended, to be resumed at a future time, it was within the power of the Bank to produce the same evil, whenever it was attempted." The conduct of the Bank had made it Taney's duty to withdraw the deposits, since its Exchange Committee, of which not one public director was a member, controlled many of the Bank's affairs.

2. The Bank wanted damages on a protested note under the French treaty. An award to the United States of certain claims against France had been made by Commissioners under a treaty. The United States had drawn a bill of Exchange against France for the

[19] This seems disingenuous.

amount. The French Chamber of Deputies refused to appropriate money to pay the award and the bill, which had been sent through the United States Bank, was returned protested. The Bank properly asked damages for its charges. Catterall[20] speaks of Taney's refusal to pay the Bank this claim for damages, as "forfeiting the national honor," showing how different is modern opinion from that of the Jacksonians.

3. The Bank used its money with a view to secure political power, and thus secure the renewal of its charter. Taney maintained that the conduct of the Bank had "been such as would induce a prudent man, in private life, to dismiss his agent from his employment."

4. "In the selection of the State Banks as the fiscal agents of the Government," Taney reported, "no disadvantages seem to have been incurred, on the score of safety or convenience, or the general interests of the country, while much that is valuable will be gained by the change." These Banks will appreciate the interests of the people and will not seek political power.

When one reads Taney's report, one thinks of the Motto: "*ne sutor ultra crepidam.*" He was a shrewd politician, and an able lawyer; but, assuredly, he was no financier. Dewey states the fundamental criticism to be made on the Report is that it was "political, rather than fiscal.[21] Bolles[22] shows the weakness of Taney's position, in that he alleged the curtailment of discounts as a cause for removing the deposits, while, by removing them to cause the retiring of the Bank's notes, his act had, as its "inevitable effect," the still further contraction of discounts. "He compelled the institution to

[20] Second Bank of the United States, p. 302.

[21] Financial History of U. S., p. 207.

[22] Financial History of U. S., II, p. 342.

curtail deposits and then most unjustly blamed it for so doing. The fairest construction, perhaps, to put on Taney's conduct, is that he did not comprehend what he was about, nor the consequences of his own acts. Others comprehended them clearly enough; but he was financially blind."

Bassett[23] is more favorable in his judgment, writing that Taney "was the ablest man in the anti-bank faction, and his report is in pleasing contrast with the loose reiterations of suspicion and assumption, which came so plentifully from his colleagues."

Justice Story wrote soon after he read this report,[24] that he thought that the Secretary of the Treasury had discretion to remove the deposits, provided he acted *bona fide.* Differing from Taney, he considered this power "a personal trust" with Taney, and one which had "nothing to do with the ordinary duties of his department." The "President had no right to intervene" in the matter, and Congress might require the deposits to be restored, even without Taney's consent. "The Secretary's discretion was not limited to cases of danger; but, if he acts *in personam,* in pursuance of the President's orders, without the independent exercise of his judgment, he violates his trust." Neither the State Banks, nor the Secretary were regarded by Story as having the right to make contracts for deposits.

On December 26 and 29, Henry Clay delivered a great speech in the Senate, attacking Taney, and so much applause followed the end of the speech, that the galleries were cleared.[25] The speech was made in support

[23] "Life of Jackson," p. 646.

[24] Story's Story II, 122, February 11, 1833.

[25] Cong. Debates, vol. 10, pt. 1, pp. 58 to 94. Van Buren in his Autobiography p. 644 (Am. Hist. Ass. Rep. 1918, vol. II) speaks of Clay's "unfair attack upon Taney, on the ground of his interest in the Union Bank of Mary-

of a resolution which stated that the reasons brought forward by Taney for the removal of the deposits were "unsatisfactory and insufficient." Clay asserted that Taney "throughout his whole career, has been uniformly opposed to democracy," and referred to the fact that, in 1820, when the country was "threatened with civil war and a dissolution of the union, voted (though the resident of a Slave State), in the Legislature of Maryland against the admission of Missouri into the Union without a restriction incompatible with her rights as a member of the Confederacy."[26] He maintained that the Secretary of the Treasury was a "mere representative and agent of Congress, acting in subordination to it, and bound, whenever he did act, to report to his principal his reasons, that they might be judged of, and sanctioned, or overruled."[27] This view has now been given up; but, with more reason, Clay complained that the public money had not been left in the Bank until December, when Congress met, and he sneered at the "reckless" and "confident assertions" of this "wonderful financier," this "modern Turgot."

Taney had his supporters, both in and out of Congress, and the New Jersey legislature, on January 11, 1834, instructed the Senators and Congressmen from the State to sustain Taney's course.[28] In the Senate, however, there was a Whig majority, and the Committee of Finance, through Daniel Webster, made a report[29] condemning the removal of the deposits.

land, which the latter turned with so much power upon his assailant." In another place Van Buren asserted "nor was there a single man, however steeped in party politics, not excepting Mr. Clay himself, who harbored a doubt of the entire purity of Taney's motives and acts." (p. 737).

[26] Op. cit., p. 76.

[27] Op. cit., p. 79.

[28] Thorpe, "Statesmanship of Andrew Jackson," p. 353.

[29] Cong. Debates, 23rd Congress, 1st Session, vol. 10, pt. 4, App. p. 146.

The Secretary's construction of the law, according to this report, was that he has power to remove the deposits, whenever, for any reason, he thinks the public good requires. . . . . The keeping of the public money is not a matter which is left, at the will of the Secretary, or any other officer of the government. This public money has a place fixed by law and settled by contract, and this place is the Bank of the United States. In this place, it is to remain, until some event occur, requiring its removal. To remove it, therefore, from this place, without the concurrence of just cause, is to thwart the end and design of the law, defeat the will of Congress, and violate the contract into which the Government has solemnly entered.

Further on, the report maintained that the Secretary's power was provisional, that the propriety of its exercise "is ultimately referred to the wisdom of Congress," and that his "contingent power was for sudden emergency to secure safekeeping." Surely, the safety of the deposits was not impaired by the approaching end of the Charter.

Calhoun took a rather different view, and, though he denounced Jackson and Taney, in a speech before the Senate, said that,

While I thus severely condemn the conduct of the President in removing the former Secretary, and appointing the present, I must say that, in my opinion, it is a case of the abuse, and not of the usurpation, of power. I cannot doubt that the President has, under the Constitution, the right of removal from office, nor can I doubt that the power of removal, wherever it exists, does, from necessity, involve the power of general supervision; nor can I doubt that it might be constitutionally exercised in reference to the deposits.

In the House of Representatives, there was a Democratic majority, and James K. Polk, the Chairman of the Committee of Ways and Means, made a report for that

Committee on March 4, approving Taney's December report[30] and stated that "the hope of obviating all the difficulties of the final substitution of a metallic currency, in exclusion of bank paper of every kind, is a mere delusion."

John Quincy Adams endeavored to give "utterance to his indignation" at Taney's conduct by a speech upon the floor of the House of Representatives, but the "address of the Speaker" and the use of the previous question prevented him from doing so.[31] He immediately published the speech he had prepared himself to deliver, in which he asserted that "the removal of the deposits, and the contract with the State Banks to receive those deposits," were both unlawful. He analyzed the Committee's report with minuteness, and concluded that their effort had been vain "to bolster up the lawless act of the Secretary of the Treasury in transferring public moneys from the lawful place of deposit to others, in one of which, at least, the Secretary had an interest of private profit to himself." This innuendo was made perfectly clear, when Adams stated further on in the speech,

> I believe both the spirit and the letter of the law to have been violated by the present Secretary of the Treasury, when he transferred the public funds from the Bank of the United States to the Union Bank of Baltimore, himself being a stockholder therein. And so thorough is my conviction of this principle, and so corrupting and pernicious do I deem the example he has thereby set . . . . that, if there were a prospect of his remaining in office longer than till the close of the present session of the Senate, I should deem it an indispensable, albeit a painful, duty of my station, to take the sense of this House on the question.

[30] Cong. Debates. 23rd Congress, 1st Sess., Vol. 10, pt. 4, App. 161. A minority report was signed by three Whig members, R. H. Wilde, B. Cochran, and Horace Binney. Op. cit., p. 177.

[31] Quincy's "Life of J. Q. Adams," p. 226.

Adams then charged that Taney "tampered with the public moneys, to sustain the staggering credit of selected depositaries," and scattered the funds "abroad among swarms of rapacious political partisans." The remainder of the speech consisted mainly of an attack upon Jackson and the policy of the financial administration and of the mistaken characterization of Taney as a "supple and permissive" tool of the President.

On February 5, 1834, the Senate passed the resolutions before it, by a vote of 28 to 18, for the first one, and 26 to 20, for the second. These resolutions asserted "that the reasons assigned by the Secretary of the Treasury for the removal of the money of the United States, deposited in the Bank of the United States and its Branches, communicated to the Congress on the fourth day of December, 1833, are unsatisfactory and insufficient;" and "that the President, in the late Executive proceedings in relation to the public revenue, has assumed to himself authority and power not conferred by the Constitution and laws of the United States, but in derogation of both." Jackson protested, on April 15, against these resolutions, and, on May 7, the Senate replied with a refusal to spread the protest on the journal. Jackson's friends, headed by Benton, labored incessantly to have this action reversed, and, on January 16, 1837, the majority of the Senate having changed from the Whigs to the Democrats, a resolution passed that body, expunging the former resolutions.

Macdonald said[32] that the "right of either House of Congress to express, by formal resolutions, its opinion of an executive act, is neither granted nor withheld by the Constitution, but the right to censure would seem to be precluded by the grant to Congress of the power of

[32] "Jacksonian Democracy," p. 227.

impeachment." Surely, this view is too extreme. The Executive act may be censurable, yet not so seriously wrong as to justify the removal from office by impeachment.

In Baltimore, also, Taney met opposition. On March 5, a public meeting was held to urge the restoration of the deposits and to receive a report of a deputation which visited Washington to see Taney.[33] The deputation was composed of William Crawford, Jr., George Brown, James W. Patterson, and George R. Gaither. Taney received them with his usual courtesy, in the presence of Isaac McKim, one of Baltimore's Congressmen, and the interview lasted for half an hour. Brown, with whom Taney had a "familiar and friendly acquaintance," told Taney that he wished to speak with him, "officially, and as a citizen of Baltimore, who could not be indifferent to its welfare." The deputation came with no unfriendly purpose, but to communicate to Taney the public distress and to ask, whether, in view of this, he could not change his position in reference to the Bank,—a position which appeared to the deputation so unfortunate. They reported that Taney told them that the "Bank had arrayed itself against the Government, and that the Government would not yield, and that the impression of the Government was that the evil the people complained of grew out of the great power of the Bank, that the Government was making an experiment and, however bold, he would not undertake to advise any change from the position it had assumed against the Bank, that he found no difficulty in transferring funds from one part of this extensive country to the other." Patterson, who had come in late, then said: "Sir, if this *experiment* should be persisted in, and *some*

[33] 46 Niles Register 30, 31.

relief, such as we do not now anticipate, should not be given—a large proportion of the trading community must fail." Taney replied, relentlessly: "If all did fail, the policy of the Government would not be changed. If the commercial classes had properly sustained their State Institutions, the present state of things would not have existed. The Government would make no change, until the present Bank charter expired. I am surprised, that, after all that had appeared in the newspapers and the long speeches made in Congress, more failures had not taken place." With this unsatisfactory report, the deputation was compelled to return home. Taney publicly denied the accuracy of the report of the conversation, and McKim lamely supported him,[34] but the deputation stood their ground, and their statements leave the impression that their memories of the meeting were the more accurate.[35]

Taney's holdings of stock in the Union Bank, amounting, it was said, to $6000 or $7000, now became a scandal and Clay, on March 25, in the Senate, referred to these holdings and to Taney's former directorship in the Bank.[36] The Bank question was intimately connected with that of the currency. Benton and Taney were hard money men, and Benton introduced into the Senate, a bill for equalizing the value of gold and silver

[34] 46 Niles Register p. 34, March 15, 1834, and p. 49, March 22, 1834, pp. 55, 71.

[35] Taney said that he knew Crawford and Gaither slightly, that he did not speak for publication, that he had not meant to speak slightingly of the "mercantile community," but had said that it might "bring a panic on the community for party purposes," and so bring on "general ruin." He was willing to leave it to the "public as to whether he, or the committeemen, would be likely to feel more sympathy for the sufferings of our citizens, and which would make greater sacrifices to alleviate and relieve them," He cried out that the "Committee misrepresents me most grossly;" but the present writer regrets that he does not believe such to be the case.

and legalizing the tender of foreign coins of both metals. Taney advocated the passage of this measure "with great zeal,"[37] for he was very anxious to do away with paper currency so far as possible. He was in frequent correspondence with Benton,[38] had frequent interviews with him, while the measure was pending, and rejoiced with Benton over its successful passage.

During the spring, the difficulties with France came to a crisis, which appeared to Taney, as he reflected upon it years afterwards,[39] the "most dangerous moment of General Jackson's administration." At a cabinet meeting, held shortly after France had refused to appropriate the money to pay indemnity stipulated by treaty, Jackson stated that he proposed to communicate the news of this refusal to Congress, by a special message, and to "ask authority to issue letters of marque and reprisal against France, in order to indemnify ourselves." Taney was surprised by this position, and still more so from the support which it received from McLane, the Secretary of State, and Cass, the Secretary of War. Taney "knew how sensitive General Jackson was upon questions, which he thought concerned the honor of the United States, and that, upon such occasions, he was apt to be prompt in decision and prompt in action; and did not always stop to calculate the difficulties in his way, or the forces that might be arrayed against him." Furthermore, he had consulted with McLane, so that

[36] 46 Niles Reg. March 29, 1834, pp. 67, 68. Niles Reg., April 5, 1834, refers to Senate vote of March 28 against Taney. An interesting letter from Aaron Burr to Van Buren relating to a claim against the United States for services in the Revolutionary War, written on March 25 and referred by him to Taney, is printed in 5 Md. Hist. Mag. 33.

[37] Tyler, p. 216.

[38] Tyler saw the letters. I cannot find them except one printed in 13 Md. Hist. Mag. 167.

[39] Letters to Van Buren, April 9, 1860, 10 Md. Hist. Mag. 16 to 22.

Taney "feared it would be very difficult to divert him from the course he suggested." Taney, however, felt it his "duty to remonstrate, immediately and earnestly, against it," calling his "attention to the condition of the country," then passing through the darkest days of the panic. "We were in no condition to go to war; if it could be avoided." France was much better prepared than we for war. Taney further "urged that, however unjustifiable and offensive the conduct of France might be, no such national insult had been offered as to require immediate hostile action to maintain our honor, and that we should not impair our rights, by forbearing, for the present, to assert them by force and until we had still further tried pacific measures, and frank remonstrances." McLane differed from Taney, and "strongly advised the message," arguing that, while there was no "sufficient excuse for an immediate declaration of war," yet, "as France had acknowledged the money to be justly due, and had, by a direct vote of its Legislature, refused to pay it, this country, by the law of nations, had a right to redress itself," by the use of letters of marque and reprisal, and that "such a proceeding was not war . . . . . and would give no just ground for war, or complaint, by the French Government." He referred to text books and to France's recent action in this way toward Portugal. Taney replied that, "although letters of marque and reprisal were not *War*, in the technical sense of the word, ... yet no nation that felt itself strong enough to vindicate its honor and resent insult, would tamely submit to such an indignity, and that, however France might have practiced it upon Portugal, she would never consent to have it practiced upon herself, nor would the French government hazard its existence, by permitting such a wound to be inflicted

upon the national pride, without resenting it by a declaration of war, or immediate hostilities." Taney perceived that he "had failed to convince the President" and "left that cabinet meeting, in a state of greater anxiety and alarm than I have ever felt at any other moment in my public life," as he wrote Van Buren in 1860. He felt sure that Congress would not authorize the sending out of privateers against France; but he feared that the friends of the Bank would be able to use such a message to convince the country that Jackson "was a rash, reckless man, acting generally from the impulses of passion."

> If, in the midst of such distress and anxiety, and upon such a cause of quarrel, he recommended a measure, which, if carried out, would, inevitably, lead to immediate hostilities with France, public confidence in his prudence and discretion would have been greatly shaken and the panic and pressure become so intense and spread so widely, that his administration would be overthrown in less than a month, and the Bank, with all its arrogance and open corruptness, fastened irrevocably upon this country.

"Not one man in a thousand of the people of the United States were aware of any serious or irritating difficulty with France, that would, by any possibility, lead to immediate hostility on either side," and, if such a "sudden and unexpected war, for which no preparations had been made," should ensue, the "President would be held responsible for all the evils that might follow" it.

Feeling sure that Van Buren's "calm and sound judgment" would lead him to concur" in Taney's opinion upon this subject and "knowing the high respect which General Jackson held for" that "judgment," Taney promptly secured an interview with him. As Taney anticipated, Van Buren "took the same view of

the subject," and was successful, in inducing Jackson to take a "calm and more deliberate view of the whole subject" and to abandon his projected message. In this action, Taney undoubtedly rendered a very important public service, though his patriotic motives were mingled with fear of the Bank.

On April 15, 1834, Taney wrote a letter to Polk, the Chairman of the Committee of Ways and Means in the House of Representatives, which letter concerned further legislation concerning, the coinage, and was transmitted by Polk to the House, with an endorsement, stating the concurrence of the Committee in the positions taken by Taney.[40] Taney began, by writing, that "It is evident that the chief part of the paper currency of the United States must always be furnished by the State banks." Congress, in his opinion, had "no power to establish by law a paper currency and the influence which they may lawfully exercise in securing its soundness is altogether incidental." These are the views of one who was destined long to be Chief Justice, but it will be remembered that the Supreme Court finally, in the Legal Tender cases, decided otherwise. Taney insisted that the currency then was "an immense superstructure of paper, resting on a metallic foundation—too narrow to support it. It has never been sustained by its own inherent strength, but by public confidence. . . . . With very few exceptions," Taney trustfully thought that the State Banks were "safe as the Bank of the United States! for that Bank could not redeem all its notes in specie if presented at once!" In fact, that Bank, with its "great money power," probably "aggravated the situation."

"The remedy is to diminish the proportion" of paper to coin and "to give to the paper currency a broader and

[40] Cong. Debates 23rd Congress, 1st Session, Vol. 10, Part 4, App. 14.

firmer metallic foundation." Taney, therefore, recommended that (1) there be reformation in the coinage of gold, which is worth more than silver, and is, therefore, not seen; (2) that the issue of small notes be prevented by not placing public money in any bank, nor receiving in payment of public dues, the notes of any bank, which issued notes below a fixed amount. This amount should, at present, be fixed at $5.00, and should later be fixed at $10.00, and eventually at $20.00. Taney could not keep the United States Bank out of mind, and held it not desirable to abolish the State Banks, or to place the business of banking in a monopoly of "great capitalists." State Banks, are useful for investment and commerce, and would be safe with more metal in circulation. Drafts and bills of exchange should transfer funds from place to place and serve as institutions of credit. The abolition of small notes would save the laboring classes from failure and depreciation of paper. The States in which banks are located can control them and prevent the abuse of power by the President in selecting them.[41] With the diminished tariff duties under the Compromise Act, the deposits would not be so large as to tempt a bank, or its stockholders, "to swerve from their duty, or to influence many respecting their conduct or opinions." Congress might also order the Secretary to distribute the deposits among the banks, according to the capital of the place where the revenue is collected, and to demand security from these banks. This additional duty would complicate the operations of the Department, and perhaps make it necessary to employ one or two more clerks. Clearly, Taney was no financier.[42]

[41] One wonders how this was to be done.

[42] 46 Niles Reg. 145, May 3, presents and criticises Taney's views as to the future regulations of the currency, as a plan which will encourage new banks, or factories of paper money.

Early in May, the Senate called on Taney for a report on the finances, believing, from the memorials of distress, that the government would soon be without adequate revenue, and would have to resort to loans. Taney sent in his report by the middle of June, showed an increase in every branch of the revenue, and thus foiled the plans of the Whigs.

The Session of Congress now neared its close, and Jackson, in accordance with the plan he had made nearly a year before, sent Taney's nomination to the Senate on June 23. It was promptly rejected on the 24th, the first such rejection in the country's history. Taney resigned on the following day[43] and returned to the practice of the law in Baltimore.

[43] Tyler, p. 221, 46 Niles Reg. 326, July 5, 1834. His house in Baltimore had been leased, and as the lease did not expire until October, Taney's family remained in Washington until then (8 Md. Hist. Mag. 306). Mr. Justice Wayne, who was a member of the Supreme Court at this time, in his eulogy of Taney after his death, spoke of Taney's course in the Cabinet, as "sincere and sustained with ability," of his arguments as Attorney General, as "listened to with the marked attention of the court" and of his briefs as "very comprehensive."

CHAPTER VIII

Resumption of Law Practice (1834–1836)

On June 25, 1834, the day after the Senate refused to confirm his nomination as Secretary of Treasury, Taney resigned the office, which under the Constitutional provision, he could have held until the end of the Session of Congress. He held that it was due to Jackson and himself to "conform" to the Senate's decision, and retire at once, and took the occasion of his letter of resignation to thank Jackson for "many and continued proofs of kindness and confidence."[1] Jackson replied at once, "paying a just tribute to the patriotism, firmness, and ability," which Taney "had uniformly exhibited" in the Cabinet. Jackson recalled with gratitude the fact that the post of Attorney General was not desired by Taney, as it was "in opposition to" his "course of life," to exchange "the independence of professional pursuits for the labors and responsibilities of the office." This gratitude had been "greatly and deservedly increased," when Taney learned "the difficulties which surrounded Jackson," and, yielding to his "earnest desire to avail" of Taney's "services in the Treasury Department," "generously abandoned the studies and avocations" of his life, and "encountered the responsibility of carrying into execution," to use Jackson's words, "those great measures which the public interest and the will of the people alike demanded at our hands. For the prompt and disinterested aid" thus afforded Jackson, at the cost of "personal sacrifices," the President felt that he owed Taney a "debt of gratitude and regard, which" he had "not

[1] The correspondence is printed in Tyler, pp. 221–223.

the power to discharge." Taney had "all along found support in a consciousness of right," and might surely look for "approbation and applause" from the people. "The plan of financial policy which you have initiated by your acts," Jackson continued, "and developed in your official reports, ... will ultimately, I trust, be carried into complete operation and its beneficial results" will be "more than an adequate compensation for the momentary injustice to which you have now been subjected." In the grandiloquent and turgid rhetoric of the period, Jackson concluded the letter, stating that, "as it is the martyrs in any cause whose memory is held most sacred, so the victims in the great struggle to redeem our Republic from the corrupt domination of a great moneyed power, will be remembered and honored in proportion to their services and their sacrifices."

Taney now prepared to return to Baltimore, and resume the practice of law. His entry into the city on July 11[2] was a triumphal one. He was escorted by a cavalcade of about 200 gentlemen and seated in a barouche drawn by four grey horses. The procession repaired to the Columbia Gardens, where Taney, Thomas Hart Benton, and Congressman Allen of Ohio, spoke, until a storm of wind and rain from the north carried away the awning from the tables and completely drenched the company. A few days afterwards, a public dinner was given Taney, and Vice President Van Buren, who was unable to be present, sent the toast "Roger B. Taney —He has in his last, best, brilliant career, passed through the severest ordeal to which a public officer can be subjected, and he has come out of it with imperishable claims upon the favor and confidence of his countrymen."

[2] Tyler, p. 224, 46 Niles Register, Scharf Chron. of Baltimore 471.

In the letter which accompanied this toast[3] the writer bore witness to the fact that "an unreserved intercourse" with Taney, while he was in the Cabinet, enabled Van Buren to "appreciate his intellectual and moral worth and his unsurpassed devotion to the best interests of our country."

Shortly before leaving Washington for Baltimore, Taney wrote Jackson of the projected reception and dinner, and then added: "You know this is my first trial in this way, and I am not sure that I am very well fitted for such scenes, and, under any other circumstances, would excuse myself. But at present, it seems to be a matter of duty, and is, moreover—I acknowledge—not a little gratfying." While he had no "desire to be a table orator, yet" he "was quite willing to make a speech" at the dinner proposed to be given him.[4]

Taney took the opportunity of the letter to testify that Mr. Gilpin appeared to be "eminently qualified for the station" of Governor of Michigan Territory, which position he desired, and that the writer should "feel gratified at seeing him" obtain the office. Gilpin had been persecuted by the Bank and its adherents and his "services and firmness" had impressed Taney favorably. During the "severest time of the struggle," Taney was in "constant correspondence" with Gilpin, who never "wavered."

[3] Tyler, p. 225.

[4] In the same letter, he referred to the Bank's correspondence with the New York Committee and with the Senate Committee of Finance, as "extraordinary acts of folly. The admission that they contain, the curtailment until they found that Congress would do nothing for them, is perfectly true. But, as they do not mind the truth when it stands in their way, I wonder they should have taken pains to publish what ought to ruin and disgrace them, if there was no other proof on the subject. Their agreement to open everything to the Senate's Committee, composed as it is, is, if possible, worse after the ground taken with the Committee of the House."

Taney and his family had just returned from a little excursion to Harper's Ferry with Van Buren, who was well received, and "saluted according to his rank." "In the evening, a volunteer band of music of young mechanics, waited upon him and played many patriotic airs." Taney was satisfied that Van Buren would "gain more and more favour, as he mixes more with the people."

Frederick, Taney's former residence, vied with Baltimore in the effort to do Taney honor, and tendered to him a public dinner on August 6. Francis Thomas, the Representative of Western Maryland in Congress, welcomed him,[5] speaking of the audience as composed of "Jackson Republicans." Taney's reply expressed his gratification for the honors with which he had been received by his "fellow citizens" of Frederick City and County. Then he said that

> I lived so many years in the midst of them and that residence is endeared to me by so many cherished recollections, that I never find myself approaching Frederick, without feeling as if I were again bending my footsteps to my own home, again to dwell in the midst of a people, whose long continued kindness to me I can never forget and shall warmly and gratefully bear in my memory to the latest hour of my life.

When he became Attorney General, most of the people of the United States were strangers to his name, he said, for he had never been in Congress. The office of Attorney General does not make one's name a familiar one. Consequently, when attacks were made upon him, he could not appeal to the previous knowledge of persons outside of Maryland. Marylanders alone knew his "long life passed in the honest endeavor to discharge, to the best of my powers, my duties, as a man and a

[5] 46 Niles Register, August 30, 1834. Tyler, p. 226.

citizen." A "great moneyed corporation" had entered politics and was preparing to obtain, "by means of money, an irresistible influence in the affairs of this nation." If it should have succeeded, "the liberators of the country would soon be destroyed" and "the power of self-government would be wrested from the people." His tenure of the Secretaryship of the Treasury had brought upon him "a deep and enduring spirit of hostility," and that spirit pursued him "with unwearied perseverance." "No man," Taney believed, "who has at any period of the world stood forth to maintain the liberties of the people against a moneyed aristocracy grasping at power, has ever met with a different fate. Its unrelenting, unquenchable hate has never failed to pursue him to the last hour of his life, and even in his grave." The political feeling of the times ran so high that even so intelligent a man could believe that such a statement was the truth, and Taney was too honest to have said what he did not believe. He felt that he could appeal to Maryland men, especially to the inhabitants of Frederick among whom he had lived for twenty-two years, and he closed his speech with an eulogy of Thomas's course in the House of Representatives in regard to the United States Bank.[6]

After these remarks, Taney went to the Court House Square, where seventeen tables had been spread and where he dined with hundreds of those who had listened to him.

Even at that time, Taney's former Federalism was recalled, and it was said[7] that "no one will pretend to say that" Taney or McLane was a Democrat. "The party

[6] Tyler, p. 233, wrote that Taney considered this compliment of the citizens of Frederick as "one of the glories of his life." Taney sent Van Buren a copy of this speech, asking for his opinion upon it. 8 Md. Hist. Mag. 305.

[7] 47 Niles Register, September 13, 1834.

distinctions were kept up in Delaware and Maryland a long while after they had been exploded in every other State, and these gentlemen were the *heads* of the Federal party in their respective States for several years after General Jackson had recommended the destruction of the monster-party spirit to President Monroe."

A third public dinner was given Taney at Elkton, on September 4.[8] Many of the subscribers were unknown to Taney, a fact which made the dinner to be considered a greater honor to him. He told the audience again of the greed and hatred of the "moneyed aristocracy," and of his acceptance of the Secretaryship through hard necessity. He believed that the plans had been deliberately formed to place the money concerns of the country in such a situation that it would be in the power of that great monopoly, the Bank of the United States, to rule or ruin this noble people." As Attorney General, Taney had advised the removal of the deposits, never expecting to carry out that device, but he found that either the measure must be abandoned and that "a great moneyed corporation would fix its deadly fangs in the free and glorious people," or the President must, "immediately, fill the Treasury Department with a Secretary, whose opinions concurred with his own." Taney continued: "I could not, without dishonor, shrink from the responsibility of executing what I had advised should be done." He understood that his nomination as Secretary of the Treasury had been "rejected by a silent vote," yet Webster, who had given one of these votes, had followed Taney "with the spirit

[8] Tyler, p. 233, 47 Niles Register, October 18, 1834. Taney explained this attack on Webster when writing Van Buren on September 16, 8 Md. Hist. Mag. 306. Taney said Van Buren's letter to him had been opened in his absence and forwarded to him as "my folks at home have a license to open my letters when I am away."

of hostility in private life" and had spoken of him at Salem as the "pliant instrument of the President, ready to do his bidding." Taney was not content with a defence. He attacked Webster, who had "found the bank a profitable client."

Taney then continued his usual offensive against the "bank, chartered by Congress, acting towards the people of the United States in the spirit and temper of a foreign enemy." Jackson's conduct had not caused the evils, but the "powerful corporation, and those who defend it seem to regard it as an independent sovereignty and have forgotten that it owes any duties to the people, or is bound by any laws but its own will." He recited the stock charges against the bank, and then continued: "It is not in the nature of a moneyed power to comprehend the feelings of independent Freemen." The Bank had not rightfully regulated currency. Gold should be currency, and was such before the Bank was chartered. Taney felt that one of his proudest recollections would be that, while he was Secretary of the Treasury, measures were started which will restore gold currency, and rescue the people "from the power of a heartless moneyed corporation." He praised Benton and Jackson, who had been foremost in the struggle against the Bank and "in the measures for maintaining union." The Bank is "now the great question."

Taney was an "inordinate smoker of cigars" and two boxes of his favorite brand were sent him while he was Secretary of the Treasury[9] by Mr. Samuel Thomas, formerly of Baltimore, who was then connected with Custom House at New York. Taney did not know who the donor was. About the time that he left the Cabinet,

[9] Tyler p. 235.

he learnt from whom the cigars came, and his high sense of official integrity was such that he sat down at once and wrote Mr. Thomson that he could not accept the cigars as a present, but would be glad to keep them and pay the market value of the cigars. Courteously, Taney insisted that Mr. Thomson "must not feel any mortification" at this act

> But it has been a fixed rule with me to accept of no present, however trifling, from any one, the amount of whose compensation for a public service depended on the department over which I presided. You will, perhaps, smile at what you may think my fastidiousness about such a trifle as your cigars. But I have thought it the true rule for a public man, and that it ought to be inflexibly adhered to in every case, and without any exceptions in the smallest matters. And having constantly acted upon it, I cannot consent to depart from it in this case, and trust that you will not suspect me of doubting for a moment the kindness and integrity of the motive which influenced you to send them.

Mr. Thomson replied that he thought Taney "almost fastidious" and felt that the rules which might have guided Taney as Secretary of the Treasury did not apply to Taney as a private citizen; but that, if his "fine feelings and independent spirit will not allow this, he might return the cigars" or send their value, ten dollars. In a very polite note, Taney enclosed that amount of money, and added that "I hope that you do not doubt that I feel as much obliged by your kind intentions, as if I had accepted them as a present."

On October 12, Taney wrote from Baltimore, to Jackson, at the end of a two weeks' illness, which had made him unable to bear the journey to Washington, in order to congratulate Jackson upon his safe return thither. At the time of writing, Taney was compelled to be in court by professional duties, although he was hardly fit

to attend to business. He was "mortified and disappointed" by the "total defeat" of the Democrats in the recent election in Baltimore City and throughout Maryland. Taney explained:

> The truth is that our friends saw that there had been such a decided reaction in favor of the administration since the last spring, and that our friends were so much excited and roused that they counted on carrying the elections by the mere force of public opinion. There was no party organization of the least value on our side. But on the side of the adversary, there was the most complete party arrangements and discipline and carried out in such detail that it reached every man in the State who could in any way be influenced. They have spent enormous sums of money for the Bank and the entire moneyed interest of Baltimore were determined, cost what it would, to wreak their vengeance on me and to procure such a result in Maryland as would be most mortifying to me, and such as they hope may affect my character and standing in other States.

Taney anticipated "a like hostility to me in my professional pursuits." However, "we shall renew the contest with vigor" and hope to regain the State before the Presidential election of 1836. Taney had sublime certainty that he was right. "The march of public opinion may be checked for a time by the profuse expenditure of money and the vehement exertions of the adversary. But I have unshaken confidence in the virtue and intelligence of the people, and am quite sure that they will soon come right. How fortunate it is that you brought on the contest early! It is so manifest that, if it had been delayed until the charter expired and the sufficiency of the State Banks had not been proved by actual experience in the meantime, the Bank could have ruined the country, or have extorted a recharter."

Taney rejoiced that Mr. Woodbury, his successor, would be able to pay off the entire balance of the national debt, after "all the claims of public distress and failing revenue." Taney thought it would be a "memorable item for the next presidential message," and that it was the first time in the history of nations that a large public debt was entirely extinguished. He closed his letter with a quaint prophecy: "When we are clear of a National Debt and a National Bank, the Republic will be safe!"

The public men of the day wrote orations to each other, under the guise of private letters. On October 20, he wrote Jackson a second letter, in answer to one sent him on the 13th, not yet being well enough to come to Washington. Jackson had learned from Taney's "amiable family" that he expected to come to Washington, but now was informed that he would not come before the return of his family to Baltimore, and wrote to express regret at this decision, as he wished to consult Taney concerning his message. He also asked for Taney's opinion as Attorney General on the United States Bank's claim for damages, and closed by saying: "Nothing will afford me more pleasure (than) to see you as a private friend, and shake you by the hand. You have my warmest friendship and most ardent wishes for your prosperity and happiness thro' life and that of your amiable family."[10]

A severe cold caught by Taney at Elkton, had been followed by rheumatism, and he could not move without pain, while his recovery was retarded by his necessary daily attendence upon court. He continually pictured himself as a martyr: "In the vindictive spirit which prevails towards me," he wrote Jackson, "among

[10] 4 Md. Hist. Mag. 303.

many of the moneyed men of the place, I am obliged to give strict attention to my professional concerns, in order to sustain myself against the influence which is seeking to prevent me from reëstablishing my former practice." He hoped to come to Washington early in November, and would prepare another opinion on the Bank's damages on the French bill, if the one cannot be found which he had previously given to a member of the Committee of Ways and Means of the House of Representatives. The Democratic successes in elections in Pennsylvania and New Jersey pleased him, as did the fact that the Senate would soon cease to have an anti-administration majority. The Bank and its partisans have been more successful in Maryland than they are likely to be anywhere else, and peculiar exertions were no doubt made here, as a mark of their especial favour to me." He was very hopeful for the future, and continued: "I am satisfied that, in less than a twelve-month from this time, the opposition will be overwhelmed and broken to pieces by the force of public opinion," and the "whigs" will have to "rack their powers of invention to find out some new name and will be as glad to disavow their connection with the Bank."

Jackson wrote again on November 8, rejoicing over the result of the election in New York, and that Taney's health was improving and urging him to "Remember I have a bed and room for you."[11]

Taney wrote Van Buren on September 16, 1834, concerning his Elkton speech, and concerning the doubtful political prospects in Maryland.[12] On March 25, 1835, he wrote Van Buren again on the political outlook, and on a vindication which Van Buren had prepared of his

[11] 4 Md. Hist. Mag. 304.
[12] 8 Md. Hist. Mag. 305.

instructions to McLane—a paper which Taney regarded as "conclusive." He felt more sanguine in writing a third letter to Van Buren on May 12, for he found the appointment of Amos Kendall as Postmaster General was popular, and the Virginia elections had resulted favorably to the Jackson candidates. Benton's effort to "expunge" the Senate's resolution condemning Jackson and Taney, pleased the latter greatly, and he thought of "writing the history of the period, with names and things at full length and in plain words."

Still another letter, congratulating Van Buren upon his nomination for the Presidency, was written him by Taney, on June 2, 1835. He had a more serious intention of writing the history of Jackson's Bank policy, and asked Van Buren's advice in the matter.

So late as November 20, Taney had not been able to go to Washington. The New York elections were "gratifying" beyond his hopes. After such a "decisive and final" popular verdict, Taney vainly hoped that "we shall now have peace for many years. The question of the succession[13] is already decided and it would be amusing enough to witness the meeting of the chief panic makers, when they come together at the approaching session of Congress." He thought that the "Bank partizans" might now become "less clamorous" and "feel that they have had enough of the war."[14]

Whether Taney was right or not, in thinking there was a concerted attempt to prevent his professional career

[13] To the Presidency.

[14] In this letter, Taney referred to an outbreak of cholera in Baltimore, conveyed the best wishes of "Mrs. Taney and the girls," and expressed the feeling that Secretary Woodbury's movement on the Branch Bank is a "proper step toward the winding up of the Bank, and the time for it has been well and judiciously chosen." Taney added that "The public mind is, I have no doubt, ready to sustain him."

being a successful one, it is certain that he had not in the higher courts as large a practice as he enjoyed before entering the Cabinet.[15] In 1835, he lost the only case he argued in the Supreme Court,[16] in which Kennedy and Meredith opposed him.

In 1834, he argued in the Maryland Court of Appeals, one case,[17] and, in 1835, he appeared as counsel in five cases.[18] The last of these has some interest, and dragged over several years, the bill having been filed in 1828. An Irishman died intestate without heirs in Frederick County, and Taney opposed the receiving of his escheated estate by the Frederick County School, of whose Board of Trustees he had formerly been president. During the trial of the suit, the School, which was a County Academy for boys until it was closed in 1915, changed its name to Frederick College, by legislative amendment of its charter. This case, which again connects Taney with Frederick and which he lost, seems to have been the last one which he ever argued in a court of last resort.

[15] We find a written opinion in the New York Public Library, dated January 17, 1835, as to the rights of Stockton and Stokes to the contract made on October 15, 1831, to carry the mail from Baltimore to Washington and Philadelphia.

[16] Ortitique v. D'Arcy. 9 Peters 692. A case in assumpsit.

[17] State v. Bank of Md. 6 G. and J. 205. Taney, Dixon, and Price v. Reverdy Johnson and McMahon. Taney lost. Preference for the State asked in the debts of an insolvent.

[18] Duvall v. Farmer's Bank 7 G. & J. 44. Taney and Boyle against Alexander, Magruder, and Reverdy Johnson. The case was upon a promissory note and came up from Anne Arundel County. Taney won it. (2) Farmer's Bank v. Duvall; 7 G. and J. 78. Magruder and Reverdy Johnson against Taney and Boyle. The case was from Prince George's County upon an endorser's liability, and Taney won it. (3) Boteler v. State. 7 G. & J. 109, a suit for debt, from Prince George's County, which Taney and Pratt lost to Reverdy Johnson and Magruder. (4) Berrett v. Oliver, 7 G. & J. 191, a suit in Chancery to have deeds annulled, which Taney and G. H. Steuart lost to Alexander and Reverdy Johnson. (5) Thomas v. Frederick County School, 7 G. & J. 369. Taney, William Schley, and Balch lost the case to Ross and Reverdy Johnson.

Gabriel Duvall, before whom Taney argued his first case in the Mayor's Court of Annapolis, was appointed Associate Justice of the Supreme Court of the United States in 1811. In old age, he was violently opposed to President Jackson; but, when he was told by Thomas William Carroll, Clerk of the Supreme Court, that Taney would be appointed to the vacancy if Duvall resigned[19] the aged Justice determined, in January, 1835, to leave the Bench.

President Jackson nominated Taney to fill the place, and the venerable Chief Justice Marshall, although he had a particular dislike to Jackson and his policies, privately advocated confirmation of the nomination.[20] In spite of this fact, when the nomination was brought up, at the last moment of the Session of the Senate, it was indefinitely postponed, and, consequently, Taney met rejection at the hands of that body for the second time.

Taney's intimate relations with Jackson continued throughout the year 1835, and, on November 21, the former submitted to the President a long opinion,[21] opposing any charge on deposits in State Banks, as proposed by Secretary Woodbury. The Bank of the United States had paid none. Taney argued that: (1) it was wrong in principle to collect money from the many to lend it out to the few to enable them to speculate; (2) it would "endanger the purity, or hazard the loss of the public money, for if the rate be low, it would be a favor," and, if the money were given to the highest bidder as to interest, "a needy, unsafe corporation" would get it; (3) the legal effect would be a formal loan

[19] Tyler, p. 239.

[20] Tyler, pp. 240–241.

[21] Written by Taney on the eve of going to Annapolis to try a case there.

of public money, for it would be loaned to banks, who, instead of having millions to produce when called for, would be debtors for millions. The right to loan out public money by banks had never, and should not be, admitted. They do so on "their own responsibility." If the banks, when asked for money, should reply it was loaned, the Government would reply it was "a mere deposit—a trust in your hands." Then it would be a breach of faith, so to treat the Government's money that it could not be returned, when the public might want it. A payment of interest implies a right to loan the money upon which the interest is paid. The only advantage gained by a bank would be to "allow it to trade freely and with less reserve, upon its own means." It is not "safe to stimulate the deposite banks to trade largely upon the public money."

A fourth argument is that the "deposite banks" kept large balances in the hands of other institutions of good credit. They could not do this, but must "rigidly exact these balances," if interest were charged upon the deposits.

In the fifth place, if the Federal money were all loaned out, "the deposite banks would be no stronger than other banks, in case a run was made upon them, and so they could not support public credit. The fact that they held public money in their vaults, would be of great value in averting a panic."

His last head was that, if interest were paid on the deposits, no further service to the public could be expected of banks, yet the Government needs other important services, in domestic exchange and in bringing gold into circulation.

Taney thought that the Bank of the United States had not given up hope of a recharter. The "struggles of

moneyed aristocracy to obtain power never cease and never can be expected to cease, until the nature of man be changed." The Bank's partisans hoped to embarrass the Deposit Banks and destroy their usefulness, Taney believed, under pretence of regulating them. He trusted that Jackson's friends would not be deceived. After two years from the removal of the deposits from the United States Bank, Taney maintained that the measure "has succeeded to the extent of our sanguine expectations," and that no new regulations were needed. Instead of the predicted bankruptcy, it was gratifying to see a "prosperous country and an overflowing treasury."

In January, 1836, Taney was invited to a public dinner to be given in Cincinnati, in celebration of the expiration of the charter of the United States Bank. Unable to attend the dinner,[22] he sent this toast: "The gold coins—long exiled from our country for the benefit of the few—they are now returning for the benefit of the many."

Chief Justice Marshall died in the summer of 1835. Mr. Justice Story would have been promoted to the vacant post, if fitness had been the only consideration. But Jackson believed in Taney's ability, felt that he must vindicate his friend from the assaults which had been made upon him, and wished to reward the political service which Taney had rendered him. During the autumn, there were rumors that Taney would be appointed and these rumors were confirmed when Taney's nomination was sent to the Senate on December 28.[23]

In the past year, the political character of the Senate had considerably changed, but Taney's chief oppcnents were still there and endeavored, with great determina-

[22] Tyler, p. 242.

[23] Tyler, pp. 249–252. 49 Niles Register.

tion, to prevent a confirmation of the nomination. Clay and Webster led the opposition, but the nomination was finally confirmed on March 15, 1836, by a majority of 14 votes. Twenty-nine senators voted for confirmation and two of them are said to have been once those who voted against him, when nominated as Secretary of the Treasury.[24] In later years, another of his opponents changed his opinion,[25] for Clay told Reverdy Johnson that he found Taney so good a Chief Justice that he asked for an interview with him, and, at that time, said:

> Mr. Chief Justice, you know that, in my place in the Senate, before your nomination to the office you now fill was submitted to that body, as well as during its consideration, I said many harsh things of you. At the time, I thought they were called for by my duty to the Senate and to the country, and, under like circumstances, with no other knowledge of you than I then possessed, I should pursue the same course. But I now know you better. I have carefully and anxiously watched your career on the bench and have sometime since become satisfied that I had done you injustice. I am now convinced that a better appointment could not have been made, and that the ermine, so long worn and honored by Marshall, has fallen on a successor (what higher praise could I give you?) every way his equal and I have sought this interview so to say to you.

Johnson added that the "mutual confidence" thus established, continued to the last.

In 1835, on account of the failure of certain banks in Baltimore and the acerbity of feeling thereby aroused, a mob sacked the house of Reverdy Johnson and of some other gentlemen connected with these banks.[26]

[24] Van Santvoord, "Lives of the Chief Justices," p. 565.

[25] Reverdy Johnson's remarks in meeting of Baltimore Bar after Taney's death.

[26] See Steiner's "Life of Reverdy Johnson," p. 14.

Taney "at once took a decided stand[27] against the outrage and the resentment; and maintained that the sufferers from the mob were entitled to an indemnity for their losses from the City of Baltimore, which was bound to protect every member of the community from violence by other members of the same community." By his advice, a petition was sent up to the Legislature, asking for indemnity. Mr. Taney prepared himself to argue the question before the Legislature, but was prevented from doing so, because he had, in the meantime, been nominated for Chief Justice."

Taney did not hesitate to give Johnson his "professional aid, as soon as he asked for it," both because Taney felt that he owed Johnson much "for the promptness with which he" at Taney's "request, investigated the affairs of the Union Bank, and saved me from the treachery of Ellicott" and also to show that he "did not sanction the disreputable design" of influencing, by a mob, a trial in court, nor "countenance the still more reprehensible scheme of associating the name" of the Democratic party with any mob for the destruction of property. He wrote Van Buren to this effect on March 7, 1836, and stated also that attempts had been made to intimidate him from coming to Annapolis, to perform his duty, and asked that his nomination be not confirmed, until this argument was over. An immediate confirmation might look as if Taney's "friends had interposed to prevent the argument" and subject him to unworthy suspicion."

[27] Tyler, p. 243. Tyler added "though the nomination" to the Chief justiceship "was still pending, his scrupulous sense of propriety forbade him to argue a cause." The letters to Van Buren printed in 8 Md. Hist. Mag. 313 & ff. show that this statement is not correct.

On the next day, Taney wrote a second time to tell Van Buren that, as soon after his speech as his friends in Washington "think right," he "should be glad to have the matter disposed of finally." He thought the party prospects in Maryland were good, and rejoiced in the splendid termination of Jackson's public life through the settlement of the difficulties with France. When Taney could come to Washington, "without incurring the suspicion of coming to electioneer with the Senate," he expected to "take an early day to pay" his "respects to his friends there and rejoice with you" over the political prospects.

On March 10, he wrote a third time, asking that action upon the nomination be no longer postponed, and on the 15th, a fourth letter dated at Baltimore, was sent Van Buren, suggesting that Upton S. Heath be appointed United States District Judge in the place of Elias Glenn, who was about to resign. Taney was much disturbed at the report which had reached him that his "sincere and excellent, but most injudicious friend, Mr. Key, had put to hazard by his conduct all the prospects of my future life," by suggesting a further postponement of action on Taney's nomination. Taney felt that he had "already done everything which duty to myself and others, required, in the case" of Reverdy Johnson and John Glenn, and hoped soon to be relieved "from the painful and embarrassing position in which I have been so long placed," with "an active and vindictive opposition to me, in the Senate and out of it, also ready to take advantage of any unforseen event to defeat me." Taney now wrote that "I have no desire that my nomination should be postponed an hour, on account of my engagements at Annapolis, and I do most anxiously desire not to be surrendered by my friends to the mercies of my adversaries."

The last letter of this series was sent by Taney from Annapolis, three days later. The hearing before the House of Delegates had been again postponed on the application of the corporation of Baltimore. Taney now felt that he had done enough to show that he was not to be intimidated "from the discharge of a clear duty" and did not "wish the action of the Senate upon my nomination to be retarded or hastened on account of my engagements here." When Taney retired from the case, he placed his notes in the hands of John V. L. McMahon, Esq., and merely appeared as a citizen, to advise the passage of the bill. McMahon's eloquent speech in behalf of the bill was ably supported by Taney's influence with Jackson. Reverdy Johnson and some of the other men whom the bill proposed to indemnify, were Whigs and there was some opposition among the extreme Democrats in the General Assembly to the passage of the measure. It was even said that Jackson opposed the bill. Taney thereupon, asked Key, his brother-in-law, to go to Jackson and avert the influence of Jackson's supposed hostility. Key did so on the evening of March 14, and wrote, immediately, to Taney,[28] that the President expressed himself, "in strong and decided terms, that the persons whose property had been destroyed ought to be fully indemnified by the community where the outrage had occurred and denied, positively, that he had ever expressed any other opinion." The Legislature passed the bill.

All things had been prepared for the simple ceremony. Taney closed his political career and began his judicial one on April 2, 1836. On that day, his long tenure of the highest judicial office in the Republic, began. On

[28] Tyler, p. 244.

Monday, at 11:00 a.m.,[29] Elias Glenn, United States District Judge for Maryland, and Nathaniel Williams, the United States District Attorney, together with the Marshal and the Clerk of the Court, waited upon Taney at his dwelling and accompanied him across the street to the Circuit Court Room, where Judge Glenn administered the oath of office to Taney before a large assemblage of people.

[29] 50 Niles Register 73.

CHAPTER IX

Chief Justice of the Supreme Court of the United States (1836–1846)

On Monday, March 28, 1836, the oath of office as Chief Justice, was administered to Roger B. Taney, in the presence of many lawyers and some other citizens.[1] He had reached the highest judicial post in the country and begun a career of twenty-eight years on the bench, in which he followed a great jurist—John Marshall. Reverdy Johnson, the leader of the American bar—in a letter written Taney's biographer on July 6, 1871, wrote that as a judge Taney "was not only eminent; but, in the opinion of many, including, as I know, Mr. Clay, was fully equal to his great predecessor."[2] Posterity has not agreed with this favorable estimate, however, and has rated Taney's services too low rather than too high. He has been considered a States' rights judge, or a "partisan of the extreme Democracy" with Jackson,[3] but this estimate is not correct, as we shall see.

He studied Lord Bacon's "Maxims"[4] and praised Bacon's speech to Justice Hutton,[5] adding the counsel that a judge should be "punctual and exact punctuality from others." He lived up to this principle. The story is told that a tradesman, with whom he dealt, lamented in his presence that he could not obtain from his lawyer a sum of money which the latter

[1] Scharf, Chronicles of Baltimore, p. 419.
[2] 13 Md. Hist. Mag. 170.
[3] Willoughby, Supreme Court, p. 93.
[4] Taney's Decisions, 618.
[5] Bacon's Works, vol. 4, London Edition, 1803, p. 507.

had collected for him. Taney sent for the lawyer, on the following day, and, ascertaining that the facts were as the tradesman had stated, told the lawyer that, unless the money were at once forthcoming he could not longer practice in the United States Court, for Taney would see to having him disbarred.[6]

Of his bearing in court, in the early years of his judicial service, we have an account from an admirer:[7]

> His manner was strikingly impressive, when his slow and solemn form was seen rising in court. . . . . He moved along, like the majestic Mississippi: full, clear, and magnificent. . . . . So soft and amiable was his deportment, that, even amidst the heat and turmoil of *nisi prius* litigation, he was never known to offend the feelings of any of his brethren: his conversation was never roughened by austerity, or pedantry, and, when his gallant bearing extorted from all the most unfeigned praise, he would almost hide himself from public admiration with the unaffected modesty of his native character. . . . . In his person, he is full six feet high, spare yet so dignified in deportment that you are at once impressed with an instinctive reverence and awe. His eye is full of genius and indicative of the powerful mind that dwells within, his features are marked with the deepest thought, and his manner is so dignified that he sheds around him, in whatever circle he may move, a moral influence of the highest order.

To the country at large, he was known only as an "astute and skillful lawyer" and an "ardent partisan and supporter of Jackson," who had forced his nomination upon the senate, because of his own high opinion of Taney.[8] When Taney became Chief Justice, Story

[6] Recollection of E. Glenn Perine, Esq.

[7] 4 So. Lit. Messenger (June, 1838) 349. The article is signed: "A Gentleman of Maryland."

[8] 15 Atlantic Monthly, C. M. Ellis 151, Tyler 252.

was the greatest of the Associate Justices. Taney wrote in later years[9] that he was "not only one of the most eminent jurists of the age; but, for a long time, one of the brightest ornaments of the Supreme Court of the United States." Story had been "*locum tenens*" of the Chief Justiceship, to use his own words,[10] in the interim after Marshall's death, and most lawyers thought that he should have been given the position permanently. At first, Story was pleased with Taney and he wrote Charles Sumner, on January 25, 1837: "Our new Chief Justice conducts himself with great urbanity and propriety."[11] He soon changed his opinion, however, for three important cases involving constitutional questions were decided by the Court, in the course of the next few months, and Taney voted in each one of these in the majority and in opposition to the views held by Story and Marshall. As a result, Story wrote Miss Martineau, on April 7, 1837: "I am the last of the old race of judges. I stand their solitary representative with a pained heart and subdued confidence."[12] Story wished to resign, because the majority of the court was "inclined to a more rigid construction of the federal powers in favor of State rights" and because he had "become convinced that a new era had come and that, with the spirit which now animated the Court, he could not hope to agree with them on constitutional points."[13] He reconsidered his decision, however, and continued as an Associate Justice, until his death in 1845.

[9] Ex parte Merryman. Tyler, p. 656.

[10] Story's "Life of Story," II, 223, 227. Letter of February 8, 1836, to Miss Harriet Martineau, in which Story wrote that he expected Taney's confirmation.

[11] Story's Story, II, 266.

[12] Story's Story, II, 277.

[13] Story's Story, II, 271.

With Taney, truly begins a new period in the Court's history, "an era of individual views, of doubts, and queries, of numerous dissenting opinions, of strict construction of the Constitution." To all this, we may well assent, though we may hesitate to follow Hampton L. Carson to the end of his sentence: "of state ascendancy, of final submission to what Von Holst has called the slavocracy;" for Taney was never a States Rights man, but an old fashioned Federalist to his death.[14] Carson's estimate of Taney is of value:

> In knowledge of technical details in all departments of legal learning, in the mastery of principles derived from constant and varied occupation in the argument of causes in Courts of inferior and superior jurisdiction, both State and National, he excelled every one of his predecessors. . . . . Delicate in health, but vehement in his feelings and passionate in temper, he expressed himself at times with extraordinary vigor and acted with promptitude and decision. He was a man of the highest integrity and of great simplicity and purity of character. By watchfulness of himself, he had acquired perfect self-control; his courage was unflinching, his industry was great; and his power of analysis was unusual even among men remarkable for such a gift. His judicial style was admirable, lucid and logical, and, like his arguments, displayed a thorough knowledge of the intimacies of pleading and niceties of practice, as well as a thorough comprehension of underlying principles.[15]

He adhered closely to the language of the Constitution and even read it as a "penal statute" and was anxious to protect the States in the full exercise of their reserved powers.

[14] Carson's "History of the Supreme Court of the United States," 289.
[15] "History of the Supreme Court," p. 291.

His mind[16] never "exercised the great, or predominating, influence over his associates, which had been characteristic of Marshall. The practice of making the Chief Justice the organ of the Court in delivering opinions was abandoned, partly, as his associates have told us, because, free from vanity himself, Taney was earnestly desirous of giving them all an opportunity of expressing their views; but, chiefly, as any close student of the decisions cannot fail to perceive, because, upon constitutional points, the Court lacked cohesion."[17]

It is ominous of Taney's judicial career that the first case reported after he came upon the bench is one in which he was in the minority[18] and the first opinion that he filed, embodying the decision of the Court, was in a case in which the question of slavery entered and which was decided favorably to the slaveholder.[19] Although five of the seven justices who sat[20] came from the free States, the abolitionists felt[21] that the slave power began, from that time, to look upon the Supreme Bench as its surest defence.[22]

[16] "History of the Supreme Court," p. 337.

[17] A loftier eulogy on Taney is given by Prof. Wm. E. Mikell of the University of Pennsylvania, 4 Great Am. Lawyers 77. "If Marshall saved the Federal Government from dying of inanition, Taney saved the States from death by absorption. It is largely to the genius of the two great Chief Justices that an indestructible union of indestructible States is due. Who in this work performed the greater service is a question that will be answered, according to the political views of the person to whom it is propounded. That Taney worked nearer the understanding of the Fathers can not be doubted by the student of constitutional history." Such excessive claims are unfortunate.

[18] 11 Peters 1. Marlott v. Silk. No dissenting opinion filed. The case dealt with a compact between Pennsylvania and Virginia.

[19] U. S. v. Skiddy (the Ship Garonne) 11 Peters 73.

[20] Story, McLean, Thompson, and Baldwin.

[21] 15 Atlantic Monthly 154.

[22] The Court decided that, under the Act of 1818, a forfeiture of a slave did not occur, in the case of the return of a colored woman to Louisiana from France, whither she had gone from Louisiana with her mistress.

Taney's defender says of this decision, and of those like it, with considerable correctness:[23]

> As a judge, pledged to administer the law, he conceived that his duty was not to seek technicalities, either to uphold or extend, restrict or prohibit slavery; but, recognizing its legality and limitations under the Constitution, his duty was to find, in the intention of the makers of that instrument and of Congress, when they acted lawfully under it, the law of the land and to declare that law, without regard to the political aspects of the question.

It is a good rule and one, alas! which Taney broke, at least upon one memorable occasion.

The three important constitutional cases decided by the Court at the January term, contrary to the views of Marshall and Story, were the Mayor of New York v. Miln,[24] Briscoe v. Bank of Kentucky[25] and Charles River Bridge Company, v. Warren Bridge Company.[26] These cases had been pending, when Taney came upon the Bench, and he wrote the opinion in the last of them.[27]

In the case of the Mayor of New York v. Miln, a law of the State of New York was upheld under the police power, which required the master of a ship, under penalty, to report in writing concerning the passengers he brought, within twenty-four hours of the vessel's arrival. The argument against the law was that the Statute was unconstitutional,[28] as conflicting with the commercial power of Congress. The Court's opinion was that persons are not the subjects of com-

[23] Mikell in 4 Great Am. Lawyers 105.

[24] 11 Peters 102.

[25] 11 Peters 257.

[26] 11 Peters 420.

[27] Barbour wrote the opinion in N. Y. v. Miln and McLean that in the Kentucky Case.

[28] Following the decisions in Gibbons v. Ogden and Brown v. Baltimore.

merce, as they are not imported goods, so that the "reason founded upon the construction of power given to Congress to regulate commerce and prohibiting the States from imposing a duty does not apply."[29]

In later years in the Passenger cases[30] a curious difference of memory as to this opinion between Taney and Wayne was revealed. Taney said that the opinion was that of the majority of the Court. Barbour read it, Thompson's opinion agreed with it and Baldwin in an opinion delivered four years later approved of it. Wayne said that only Barbour and Taney favored it as a whole and that the opinion had not at any time the concurrence of a majority of the Court, except in so far as it stated that so much of the act as required the captain of a vessel to report his passengers was a police regulation and therefore was not a violation of the power of Congress to regulate commerce. Carson remarks that "each, with the most perfect sincerity, and fullness of detail states what he recalls of the discussion and of the points determined and each with perfect courtesy, but with characteristic firmness, contradicts the other and labels the statement of his opponent as a dangerous error."

Taney here, as ever, continued his advocacy of a narrow construction of the commerce clause, to which he had committed himself while counsel in Brown v. Baltimore.

In the second case, Briscoe v. Bank of Commonwealth of Kentucky, the Court upheld the constitutionality of a Statute, allowing a bank, in which a

[29] Justice Thompson argued for the validity of the State law, *ab silentio* Congress. The doctrine of the case was controverted by Smith v. Turner, 7 Howard 283, in 1849, and the Court reviewed the question in Curley v. Board of Post Wardens, 12 Howard 300 in 1851.

[30] 7 Howard 429, 484, vide Carson's Supreme Court 333.

State held the stock, to issue paper money and held that such a grant did not contravene the prohibition in the National Constitution against a State's emitting bills of credit.[31]

The third case is more important for our present purpose. It not only involved the constitutionality of a State law; but also concerned the famous Dartmouth College Case, in which it had been held that a charter constituted a contract, the obligation of which would be impaired by any change in the charter without consent of the Corporation chartered. Such impairment of a contract was forbidden by the Constitution of the United States, and Webster, who had won the Dartmouth College Case, was here defeated for the first time in a Constitutional question. The gist of the case was whether the incidental advantages conferred by a charter could be essentially diminished, or taken away, by a subsequent charter to another corporation. Those who had followed Taney's career and had read his opinion in the case of the Camden and Amboy Railroad[32] could have had no doubt as to how he would vote in the decision of this question. The opinion is his first important one and is a fine piece of work, characterized in Carson's words[33] by the "broadest statesmanship." Taney's ardent admirer, George W. Biddle, wrote of the decision:[34]

Unless the luxuriant growth, the result of the decision in 4 Wheaton,[35] had been lopped and cut away by the somewhat tren-

[31] See D. R. Dewey's "Financial History of United States," p. 261. This case conflicted with Craig v. Missouri, 4 Peters 410 (1830).

[32] See Chapter VI.

[33] Hist. Sup. Ct. p. 292.

[34] Constitutional History of U. S. as seen in the Development of Am. Law. Lectures before the Political Science Association of the University of Michigan 133.

[35] The Dartmouth College Case.

chant reasoning of the Chief Justice, the whole field of legislation would have been choked and rendered useless in time to come for the production of any laws that would have met the needs of the increasing and highly developed energies of a steadily advancing community.[36]

Tyler[37] wrote of the decision, as "enforced with the most convincing reasoning, founded on sound legal doctrine and expressed in the most felicitous diction," and as a decision "most auspicious for the country," since "it left the States free to push forward the great improvements by which the earth had been subdued to the dominion of man."

Story had considered the argument of the case "complete and fine"[38] but, when the opinion was rendered, he wrote his wife:[39] that he was sorry for the decision by a divided court and believed that "a case of grosser injustice, or more oppressive legislation, never existed. I feel humiliated, as I think every one here is by the act which has been confirmed." Webster, of course, commended Story's dissenting opinion, but Chancellor James Kent was also just as earnest in condemning the decision, when he "reperused" the case, with "increased disgust." The Briscoe case appeared to him "quite as alarming and distressing" and he, despairingly, wrote:

[36] In unmeasured panegyric, Prof. Mikell wrote, in 4 Great Am. Lawyers, p. 128: "The greatest expounder of the Constitution that ever sat on the Supreme Court Bench became the truest expounder of the intentions of those who framed that great instrument. In was his glory that, with a sane mind, untroubled by the criticism of partisans, sincere or otherwise, he interpreted the Constitution, or lent the weight of his influence to its interpretation, so as to reserve unimpaired to the States the rights reserved to them and, at the same time, to give full effect to all the powers granted by the States to the Federal government."

[37] Vide, pp. 274–279; this quotation is from p. 277.

[38] Story's Story II, 265.

[39] Story's Story II, 268.

"I have lost my confidence and hopes in the constitutional guardianship and protection of the Supreme Court."[40]

After returning to Massachusetts, Story found no cause to change his mind; but wrote thus to his colleague, Justice McLean,[41] upon May 10:

> The opinion delivered by the Chief Justice has not been deemed satisfactory and, indeed, I think I may say, that a great majority of our ablest lawyers are against the decisions of the Court, and those who think otherwise are not content with the views of the Chief Justice. . . . . There will not, I fear, ever, in our day, be any case in which a law of a State, or of Congress, will be declared unconstitutional; for the old constitutional doctrines are fast fading away and a change has come over the public mind, from which I augur little good.

It is a curious commentary upon this prediction that, after near twenty years of calm acquiescence with the decisions of the Supreme Court, great turmoil arose and disapproval of the Court's position was especially voiced in New England, when a Federal Statute—the Missouri Compromise—was declared unconstitutional in the Dred Scott Case. Thayer[42] states that Greenleaf, who was counsel for the defendants—the Warren Bridge Company—suffered reproach from a highly excited community.[43]

[40] Story's Story II, 269, 270.

[41] Story's Story II, 272.

[42] Select Cases on Constitutional Law, 1641.

[43] He filed in the Harvard College Library a volume, containing minutes of the various arguments, etc., and included in the book a newspaper clipping containing Taney's opinion, in 1832, on the Trenton and New Brunswick Turnpike Company in New Jersey. The volume also contains an opinion by Kent, in which Webster concurred, stating that Taney's opinion in the above matter had been read, but discussion was waived "upon that point, as not necessary in the view which I take of the case. I certainly think the legislative stipulation ought to be sternly construed, as one that may be exceedingly inconvenient for the public welfare."

A writer in *New York Review*[44] for April, 1838, thought that these three constitutional cases showed an "altered tone and narrower spirit," than was exhibited in Marshall's time. Five of the justices—a majority of the Court were Jackson's appointees and the change in the Court was "so great and ominous that a gathering gloom is cast over the future." The writer's objections to the Charles River Bridge case were: (1) "what is most damning and most heretical in this opinion is the new fangled doctrine that the contracts of the State are to be construed strictly as against the grantee and that nothing can be raised by implication;"[45] (2) that there was a "surrender to the avidity and encroachments of the State Sovereignties of the great and essential—and exclusively National—power in Congress, to regulate commerce,"[46] and that (3) a "salutary injunction in the constitution is so reduced, by strict and subtle constructions, as to amount only to an empty sound"—and indeed all ground gained under Marshall may be lost.[47]

Let us now examine the circumstances of this important case and the grounds of Taney's opinion.[47] The issues of the decision,[48] involved questions of the "gravest character," to the answer of which the Court had given "most anxious and deliberate consideration." The right had a large value, many persons were affected as to "their pecuniary interests," and the determinations "as to the powers of the States, in relation to corporations they have chartered, are pregnant with

[44] 2 N. Y. Rev. 372.
[45] Page 389.
[46] Page 397.
[47] Page 399.
[48] 11 Peters 420—McLean, Story, and Thompson dissented, pp. 536 & ff.

important consequences" both to individuals and to communities. The Court felt that it "must preserve the rights of property and carefully abstain from any encroachment on the rights reserved to the States."

As far back as 1650, the General Court of Massachusetts granted Harvard College, the right to dispose of a ferry from Charlestown to Boston. In 1785, in response to a petition, there was chartered the Charles River Bridge Company to build a bridge over the Charles River, where the ferry had been kept. The Charter was granted for forty years from the opening of the bridge and the company was directed to pay £200 yearly to Harvard College. At the end of the forty years, except for a reasonable compensation to Harvard College, the bridge should become the property of the Commonwealth. The bridge was opened in 1786 and, in 1792, the General Court extended the life of the Corporation for ten years from the termination of the forty years previously granted. Within the term of the corporation's life, in 1828, the General Court incorporated the Proprietors of the Warren Bridge, to build another bridge over the Charles River which second bridge was located 16 rods from the old one at the Charlestown end and 50 rods away at the Boston end. This Warren Bridge, by the terms of the charter, was to be surrendered to the State, as soon as the expenses of building it had been met from the proceeds of the toll taken thereon and, in any case, not more than 6 years from the time when toll began to be taken.

The Charles River Company then asked for an injunction against the Warren Bridge Company and, in its original bill, alleged the impairment of the obligation of a contract by the charter which had just been granted.

A supplemental bill stated that the new bridge had been completed and had resulted in an actual loss of toll at the old bridge.

In 1829, the Massachusetts court decided that there had been no impairment of the obligation of a contract and, on a writ of error, the upper court was equally divided, so the original decision stood.[49] In the period between this decision and the decision of the Supreme Court, the Warren Bridge Proprietors had received sufficient toll to reimburse them and the bridge became the property of the Commonwealth, which abolished the tolls on it and thus practically destroyed the value of the franchise of the Charles River Bridge.[50] The plaintiffs alleged that the right of Harvard to a return from the tolls on the bridge was exclusive and, independently of the ferry right, the acts of the General Court necessarily implied that the Legislature would not authorize another bridge, whereby the old franchise was made of no value. They claimed that both the ferry and charter grants were contracts on the part of Massachusetts, and that these were impaired in their obligation by the Warren Bridge Charter. The Supreme Court held that a State law might be retrospective and violate vested rights and yet not be set aside, as contrary to the United States Constitution. The plaintiff must show "that the State had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the

[49] The case is reported in 6 Pickering 376 and 7 Pickering 344 (1830).

[50] Some of these latter facts, if material, ought have been brought in by supplemental bill, in the view of the Court; but the opinion treated the case, as if they were regularly before the tribunal, as those facts would not, "in any degree, influence the decision" and, as they were conceded to be true, and the case had been argued on that ground, and both parties desired a final end of the long controversy, and as it was important that the principles on which the case was decided should not be misunderstood.

Warren Bridge is erected." It was almost impossible, of course, to do this. Taney denied that it had been shown that any exclusive privileges granted to Harvard College had been transferred to the Charles River Company and were still in existence. The payment of £200 *per annum* to the College had been claimed to give the proprietors of the bridge an equitable claim to be treated as assignees of the College's interest and, by substitution, to be vested with its rights, but Taney held that the answer to this claim was obvious—the sum to be paid from the tolls was to be collected from the public and it was intended that the public bear this expense. The agreement to pay that sum gave, therefore, no equitable right to the plaintiffs to be regarded as assignees of the College and, certainly, furnished no foundation for presuming a conveyance.

As the proprietors of the Charles River Bridge were neither legal, nor equitable assignees of the College, the ferry franchise could not be involved in the case. The Harvard College privilege could not extend the privileges of the Bridge Company. There might well have been a change of policy in the mind of the General Court. The franchises are different in nature and were established by separate grants, which had no words to connect the privileges of the one grant with those of the other. "The charter to the Bridge is a written instrument, which must speak for itself and be interpreted by its own terms. The charter is a grant by the Public to a private corporation and in a matter where the public interest is concerned." Following English precedents, the Court must construe such grants strictly, giving no enlarged privileges by implication. The fact that the power of the Commonwealth had been so exercised as to destroy the value of the franchise could not affect the principle.

The object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And, in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power; because, like the taxing power, the whole community have an interest in preserving it undiminished. . . . . The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation and the functions it was designed to perform, were transferred to the hands of privileged corporations.[51]

The Court held that there was no exclusive privilege given the old bridge company over the waters of the Charles River above or below their bridge. They had no right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement had been made by Massachusetts that another bridge should not be erected. No undertaking had been given not to sanction competition, nor to prohibit improvements, which might diminish the amount of the old company's income. If the plaintiff were entitled to any of those rights, it was, by implication, from the nature of the grant, and not from its words. The Warren Bridge neither interrupted the passage over the Charles River Bridge, nor made the way to, or from, it less convenient. "The gist of the complaint" was that, while "all franchises and rights of property enumerated in the charter . . . . remain un-

[51] We have here a distant echo of the controversy with the United States Bank.

impaired, ... its income is destroyed by the Warren Bridge." The Court replied that the charter contained no contract in words made by the Commonwealth not to diminish the amount of tolls through competition and no implication could be allowed. "The whole community are interested in this inquiry and they have a right to require that the power of promoting their comfort and convenience and advancing the public prosperity by providing safe, convenient, and cheap ways for the transportation of produce and purposes of travel, shall not be construed to have been surrendered, or diminished, by the State, unless it shall appear, by plain words, that it was intended to be done." The act of 1792, which extended the term of the charter of the Charles River Bridge Company, also incorporated another company to build a bridge, the West Boston Bridge, over that River at a distance of between one and two miles from the old bridge and the reason for the extension of the charter was stated to be that the erection of another bridge may diminish the emoluments of the Charles River Bridge Company, whose undertaking was "a work of hazard" and should be encouraged. From this act, Taney drew the conclusion that the General Court, within seven years of the grant of the original charter, did not suppose that it had deprived itself of the power to alter it and, in the amending act, was careful to use language which would "exclude the inference that the extension was made, on the ground of compromise, or as compensation for rights impaired." The plaintiff, holding a franchise under the law of 1792, can not add to the privileges expressed in the charter an implied agreement, in direct conflict with a portion of that law. Taney considered that it would be hard to prove such a claim

against an individual, still more against the State. "It would, indeed, be a strong exertion of judicial power," Taney held, "to raise, by a sort of judicial coercion, an implied contract and infer it from the nature of the very instrument, in which the legislature appears to have taken pains to use words which disavow and repudiate any intention on the part of the State to make such a contract." The practice of States in chartering railroads and turnpike companies was against the plaintiffs' contention, which had not previously been urged in any similar case. If the contention were granted, where could the line be drawn, Taney inquired, in such an *argumentum ab inconvenienti?* Old turnpike companies would at once bring suits against railroads, "an arbitrary rule of distance would have to be fixed and the States would be unable to avail themselves of the lights of modern science." Principles which lead to such bad results should not be sanctioned by the Court.

Such was the Court's decision and Taney's opinion expounding it. The general opinion of the legal profession today is that the decision was a wise and just one and that Taney's opinion worthily stated the grounds for that decision and showed that, when he had been placed as Chief Justice, the high position had been given to an able jurist, who could clearly, wisely, and sententiously deliver the law, as interpreted by the august tribunal.

Taney rendered only two other opinions at the 1837 term of Court. Both of these concerned the jurisdiction of the courts: in one of them[52] he held that there was no Federal jurisdiction on the question as to whether a person claiming land in Pennsylvania on an invalid

[52] McBride v. Hogg 11 Peters 171.

deed, given on a sale for taxes under United States law, had the right to redeem the land; and, in the other, he refused to grant a *mandamus*, since a *prima facie* case had not been made.[53]

The year 1838, saw a new phenomenon, the Chief Justice disagreeing with the majority of the Court upon a Constitutional question, in the boundary dispute between Rhode Island and Massachusetts.[54] He considered the powers given the courts by the Constitution as judicial only, not extending to political subjects and maintained that Rhode Island sought to recover not land, but "sovereignty and jurisdiction," which are not matters of property, but are political rights and, therefore, are not subjects of judicial cognizance. It is fortunate that the Court did not follow Taney here, for to have done so would have caused the power to determine controversies between the States to lose much of its value.[55]

In another case of this year, Taney delivered the Court's opinion and held that, when there was a dispute as to land grants made by Spain, between the Mississippi and the Perdido River, the determination of the boundary between West Florida and Louisiana was a political question.[56]

[53] Postmaster General v. Trigg 11 Peters 173. In Livingston v. Story, 11 Peters 351, Taney did not sit, as he had been counsel in the case, before his elevation to the bench.

[54] He filed an opinion, in accordance with the practice in constitutional cases, but stated that he would give his full opinion after the final hearing of the case. 12 Peters 657, 752. The case had been continued in the preceding year. 11 Peters 226. The Court refused to dismiss the suit for want of jurisdiction.

[55] See Tyler, p. 279. The case was finally decided in 1846. 4 Howard 591.

[56] Garcia v. Lee, 12 Peters 511. In Strother v. Lucas 12 Peters 410 Taney did not sit, having been counsel in the case.

About this time, we find the beginning of that long series of opinions upon questions of practice and procedure, which were generally left to Taney's care, while he was upon the bench. These opinions are, frequently, short and, while they have no dramatic interest nor constitutional importance, yet they constitute an important service rendered, in standardizing the adjective side of the law, as practiced in the Supreme Court.[57]

In a case where Maryland law had to be construed, Taney delivered the opinion of the Court[58] and, in another one, he concurred in the decision, but not in the reasoning.[59]

Taney dissented in 1838, in the case of Kendall v. Stokes[60] in which the Court held that a mandamus would issue to command the Postmaster General to perform a ministerial act. Tyler praises Taney's dissent,[61] as showing "perfect knowledge of the remedies furnished by the law of England, in all their changed adaptations, from age to age." It is interesting to

[57] These cases are: (1) Benton v. Woolsey, 12 Peters 27. A valid bill of information may be brought in the name of the United States District Attorney, but the correct practice is to bring suit in the name of the United States; (2) Bradstreet v. Thomas 12 Peters 59. Averment of Citizenship. (3) McNiel v. Holbrook 12 Peters 84. The Statutes of States which prescribe rules of evidence in civil cases are included under section 34 of the Judiciary Act; (4) West v. Brachear, 12 Peters 101, Opinion of 2 paragraphs, a dismissal of an appeal; (5) Wilson v. Life Ins. Co. 12 Peters 140. A writ of error naming the plaintiffs as heirs of Wilson is bad and defects may be taken advantage of until final judgment; (6) Sarchet v. U. S. 12 Peters 143, a writ of error and appeal; (7) Story v. Livingston 12 Peters 340, The Court below refused correctly to put on the record facts showing that the suit was abated before appeal. (8) Poultney v. LaFayette City, 12 Peters 473, Rules of Court.

[58] Steele v. Carroll 12 Peters 201. Question of mortgage and dower.

[59] Toland v. Sprague 12 Peters 336. Court held, contrary to Taney's view, that the Circuit Court could not attach the property of a foreign debtor.

[60] 12 Peters 524, 626.

[61] Page 305.

notice that, even in questions of practice, Taney did not dominate the Court always. He had wished to confine the decision to a narrow point and expressed his surprise that "so many grave questions of constitutional power have been introduced and so earnestly debated." The position of Postmaster General was created by Congress, which may limit its powers and regulate the procedure. Taney held that Congress had not conferred jurisdiction in this matter on the Circuit Court of the District of Columbia and that the controversy returned solely on the construction of an act of Congress. In order to confirm his position he made an elaborate study of the history of the writ of mandamus, a high jurisdiction in the Prerogative and General Courts of Maryland, whence the City of Washington in the District of Columbia had been taken.

After the announcement of the decision of the Court, Taney was considerably criticised in the newspapers, as having been "influenced by party feeling to protect General Jackson's Postmaster General." Mr. Richard Peters, the Court Reporter, wrote Taney concerning these comments and Taney replied, on March 27,[62]

> The daily press, from the nature of things, can never be the the "field of fame" for judges; and I am so sensible that it is the last place that we should voluntarily select for our discussions, that, on more occasions than one, when I have seen my opinions at Circuit incorrectly stated, I have declined publishing the opinion really delivered, because I did not think it proper for a Judge of the Supreme Court to go into the newspapers to discuss legal questions.

[62] Tyler, p. 307. Peters had proposed to dedicate his digest to the Chief Justice and Taney esteemed it "no small honor" to have his name associated with the book, but should "chiefly value it, as the evidence of the friendship and kind feelings we have cherished for each other."

Biddle[63] considered that Taney's "opinion exhibits, in a high degree, the ability of the Chief Justice to present an argument upon a technical point, with the nicest precision of reasoning, the closest application of the rules for the exposition of Statutes, and the fullest and fairest examination of the grounds upon which the opposing argument is based."

He had originally intended merely to concur with a dissenting opinion written by Judge Baldwin, but the publications led him to change his mind and he wrote a separate dissent, which he would send Peters, "as soon as it is brought within proper dimensions." He found the opinion "longer than I like and I retain it for the purpose of condensing the argument." Taney was rarely prolix and closed his letter thus: "You know my settled dislike to a long opinion, when justice to the case can be done by a short one. Yet I fear I sin in unnecessary length, as often as any of my brethren."

In 1839, Taney filed the Court's opinion in one quite important case—the Bank of Augusta v. Earle[64] The case had come up from Alabama, and was one of assumpsit on a bill of exchange[65] but these corporation cases (for two other cases depended on the same principle) took their chief value because in them was involved an important constitutional question in reference to the States: viz., are the corporations, created by the Statutes of one State, permitted by comity to make contracts in other States and sue in their tribunals. The particular question involved in the case was this—may a bank incorporated by Georgia with power to purchase bills of exchange, purchase them in Alabama,

[63] Const. Hist. of the U. S. as Seen in the Development of Am. Law p. 137.

[64] 13 Peters 519. Tyler, p. 281.

[65] Vandegraff and Webster were the attorneys for the parties.

or is such purchase void? Many such contracts had been made, so that the question was of a "very grave character," from the amount of money involved. "Whenever a corporation," in Taney's words,[66] "makes a contract, it is a contract of the legal entity of the artificial being created by the charter and not the contract of the individual members," so that the acts performed must be such as are authorized by the charter and must be made by the officers and in the manner authorized thereby. If the law creating a corporation does not give it the right to exercise powers beyond the limits of the State chartering it, the contracts made outside that State's jurisdiction are void, but here Georgia "clothed the corporation with the right to make contracts" out of the State, in so far as Georgia could do it. The purchase of the bill of exchange was, therefore, the exercise of power possessed by the Bank under its charter. The question then came before the Court: Can the laws of a State have an extra territorial operation, or can a corporation, a creature of the laws of a State, have existence beyond the limits within which that law operates? Taney thus answered the question:

> It is very true that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it is created. . . . . It must dwell in the place of its creation and cannot migrate to another sovereignty. . . . . Yet it does not, by any means, follow that its existence will not be recognized in other states, and residence in one State creates no insuperable objection of its power of contracting in another. . . . . Natural persons, through the intervention of agents, are continually making contracts in countries where they do not reside and where they are not personally present when the contract is

[66] Page 587.

made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?

It is sufficient that its existence as an artificial person in the State of its creation is acknowledged and recognized by the law of the nation where the dealing takes place and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

He then elaborately discussed the question whether corporations of one State are permitted to make contracts in another by the comity of nations and by the comity existing between the States and decided that "comity is no impeachment of sovereignty, but is a voluntary act of the nation by which it is offered. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations." No sufficient reason is found for excluding foreign corporations from such comity, "when they are not contrary to the known policy of the State, or injurious to its institutions." The State merely admits the existence of an artificial person and recognizes the law of the foreign State. States in the Union here stand upon not quite the same footing as foreign countries. "The intimate Union of these States, as members of the same political family; the deep and vital interests which bind them so closely together should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another

than we should be authorized to presume between foreign nations." These "sovereign States," in their history and in "the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity to their fullest extent." If a corporation may sue in the courts of a state, there is no reason why it may not make a contract. Both comity of contract and comity of suit are part of the law of the State. Pennsylvania prohibits the making of certain contracts by foreign corporations—a statute which shows that any other such contracts are legal, and the Maryland law provides a way to enforce such contracts. The Alabama law is not against the suit of a foreign corporation and the State itself is not a party to the suit. The contracts were made in good faith, a fact which shows what was the generally received opinion in Alabama, at the time of making the contract.

This strong opinion showed Taney's Federal opinions and has been a valuable precedent for many other cases, furnishing correct doctrine to subsequent generations of judges. Biddle[67] wrote of it as a "compact, well-reasoned opinion, ... remarkable in its statement of the law, as well in what it affirms of the arguments of the very eminent counsel[68] who represented the different plaintiffs in error."

Story on April 19, 1839, wrote Taney from Cambridge, Mass.,[69] "your opinion in the corporation cases has given very general satisfaction to the public, and, I hope you will allow me to say, that, I think it does great honor to yourself as well as to the Court."

[67] Const. Hist., p. 141.

[68] Ogden, Sergeant and Webster.

[69] Tyler, p. 288. Tyler speaks of the extensive correspondence between Story and Taney, which I have not found.

At the same term of Court, Taney filed an opinion in an action of ejectment,[70] in which the date of the cession of the District of Columbia to the United States was involved and in which he said, in reference to the manner of signing deeds, "if Maryland Courts had given a contrary construction, we should, of course, feel it to be our duty to follow their decision."[71] Most of his other opinions, during that year, were upon points of precedure.[72]

In 1840, Taney's chief opinion was that in the case of Holmes v. Jennison;[73] a case in which there was so divided a court that no official opinion was filed. Taney joined with Story, McLean and Wayne in the majority and the very list of names shows that the decision was no States' Rights one. Buchanan, in a speech delivered in Congress on May 9, 1842,[74] attacked Taney's opinion in this case, saying: "I have always entertained the highest respect for the present distinguished Chief Justice of the United States, but . . . . some portions of his opinion[75] in this case are latitudinous and centralizing beyond anything I have ever read in any other judicial decision." Story, on the other hand[76] wrote in May, 1840, to Mr. Peters, the Reporter of the

[70] Van Ness v. Bank of U. S. 13 Peters 17.

[71] Page 21.

[72] (1) 13 Peters 23 R. I. v. Mass. The Court will not apply to suits between States the same rules as to an answer which govern individuals, (2) 13 Peters 153 Reed's lessee v. Marsh New Trial, (3) 13 Peters 225 Ex parte Hennen, A judge of the Supreme Court has no power in the August term to allow a rule to show cause why a mandamus should not issue. The only other opinion was in Andrews v. Pond 13 Peters 42, a case involving protested bills, charge for exchange, and usurious contracts.

[73] 14 Peters 540.

[74] Works V. 238.

[75] Especially pp. 569–570.

[76] Tyler, p. 290.

Supreme Court: "In my judgment the opinion of the Chief Justice in the Habeas Corpus case is a masterly one and does his sound judgment and discrimination very great credit. I think it will (as it ought) elevate his judicial reputation. I entirely concurred in that opinion with all my heart; and was surprised that it was not unanimously adopted."[77]

The circumstances of the case were these: Holmes, a Canadian, was accused of a murder committed in the Quebec District of Canada and the Canadian authorities requested the Governor of Vermont to order his delivery to them. The Governor issued orders to the Sheriff to do this and the Vermont Court upheld him, when a writ of habeas corpus was sued out by Holmes, in order to resist extradition. The question which came before the Supreme Court for final judgment was whether this action was in accordance with the United States Constitution and the Court decided that it had no jurisdiction, upon a writ of error, to revise the decision of a State Court on a writ of Habeas Corpus which remands a prisoner to the custody of a sheriff under warrant of the Governor of a State to be delivered to the authorities of a foreign country, there to be tried for crime. The Court's inquiry involved the relative powers of the Federal and State Governments. Taney's opinion was that the power to surrender would not differ whether the person arrested were a foreigner, or a citizen of the United States. "If this power remains with the States, then every State in the Union must determine for itself the principles upon which they will exercise it and there will be no restriction upon the power, but the discretion and good feeling of each

[77] Peters quoted this letter to Taney, who responded that he was "not a little gratified" at Story's judgment and that his praise was "worth receiving."

particular State." The power is a part of the foreign intercourse of this country and that has undoubtedly been referred to the Federal Government. It is an exclusive one, for it is forbidden to the States[78] to enter into any agreement with foreign States and there has clearly been an agreement made, between Vermont and Canada, to deliver Holmes. Furthermore this power is incompatible with powers conferred on the Federal Government. "In expounding the Constitution of the United States, every word must have its due force and appropriate meaning; for it is evident, from the whole instrument, that no word was unnecessarily used, or needlessly added." This is good Federalist doctrine and Taney affirmed that "the framers of the Constitution, manifestly, believed that any intercourse between a State and foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in the separate States." If the "power remain in the States, the grant to the general government is nugatory and vain." Taney maintained that "it is not the mere power to deliver up fugitives from other nations" on the demand of these nations, that was here involved; but rather the right to "determine whether or not they ought to be delivered and to make that decision effectual." Different States might decide the question differently, The power was not a part of the police power and was of no advantage to the States. Most people today would agree to Taney's assertion that it was "one of the main objects of the Constitution, so far as regarded our foreign relations, to make one people and one nation, and to cut off all communications between foreign governments and the several State authorities." The

[78] Const. Art. 1, Sec. 10, clauses 1 & 2.

majority of the Court would not adopt this view and strangely enough, the man who wrote it has been called an advocate of States' Rights.

Taney has been accused of being a friend of slavery, but he did not show such leaning in the opinion in the case of the United States v. Morris,[79] in which a vessel had been seized on a voyage from Cuba to Africa. He held that, to constitute offences denounced in the act of 1800 aginst the foreign slave trade, it was not necessary that there "should be an actual transportation of slaves" in a vessel. There was sufficient evidence, if a vessel was shown to have been bound for the coast of Africa, "for the purpose of taking slaves on board to be transported to some foreign country, and the defendant, having knowledge of the business and being an American citizen, was on board voluntarily."

In another case dealing with external matters, Taney held[80] that the decision of the Board upon French treaty claims, under the Act of 1831, as to the seizure of a vessel's cargo in 1809 and the rights of conflicting claimants, was not conclusive, but that the question of the respective title was fully open to be adjudicated by the Courts. Foreign trade in war time was also involved in the case of a vessel seized while sailing from Buenos Ayres to Brazil,[81] concerning which seizure Taney was of opinion that as the covering of belligerent property by neutral papers was not so illegal as to prevent the enforcement of contracts based on that property, consequently, "money recovered from a foreign government, as compensation for the capture of

[79] 14 Peters 464.

[80] Frevall v. Bache 14 Peters 95.

[81] De Valengin's Administrators v. Duffy, 14 Peters 282.

property so covered," was not so tainted, but that the true owner could recover from the ostensible owner.[82]

Questions of jurisdiction, of course, fell to Taney and he held that a mandamus will not issue to compel the Secretary of the Navy to perform a discretionary act for the benefit of a commodore's widow. "The interferences of the courts[83] with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief."[84] In reference to the judgments of the State Courts, Taney held that the Supreme Court could not[85] examine the question as to whether one decree of a State Court is in collision with another decree of the same court in a second suit concerning the same subject matter.[86] If the decision of a State Court[87] is against the validity of a State law which was alleged to contravene the Federal Constitution, the Supreme Court had no jurisdiction; for the power given it "was intended to protect the general government, in the free and uninterrupted exercise of the powers conferred on it by the Constitution and to prevent any serious impediment being thrown in its way, while acting within the sphere of its legitimate authority."[88]

[82] When property has been lawfully received by an administrator after death of an intestate, in virtue of his representative character, he is liable for it, either in that character, or personally, at the election of the party having a good title.

[83] Decatur v. Paulding 14 Peters 477. Several opinions were filed.

[84] In U. S. v. Stone 14 Peters 524, the Court discussed the jurisdiction in suits appealed from Circuit and district courts.

[85] Mitchell v. Lenox, 14 Peters 49.

[86] In West v. Brashear, 14 Peters 51, Taney gave opinion that the mandate of the Supreme Court to a Circuit Court must be the latter's guide in executing judgments, but that the mandate may be interpreted by the decision delivered in the case.

[87] Commonwealth Bank of Kentucky v. Griffith, 14 Peters 56.

[88] In an action of ejectment, coming from the District of Columbia (Remington v. Linthicum, 14 Peters 84), he stated that the Court upheld the Mary-

The boundary dispute between Rhode Island and Massachusetts was again before the Court in 1840[89] and Taney delivered the opinion, not on the merits of the case, but upon the technicalities of pleading. He held that the case, which was one of first impression, but which has had a number of successors, to which States have been parties, should be conducted, according to Chancery pleading and practice rules, yet so moulded and applied as to bring the cause to a hearing on its entire merits and that it should not be decided on merely technical principles of chancery pleading. When a decision on a plea concerning the boundary might have the effect of keeping out of view some part of the merits of the complainant's case, the Court should refuse to decide the case on that plea. The charter of Massachusetts placed the south boundary of that Province three miles south of the Charles River. Commissioners laid out a line between the two colonies between 1710 and 1718, but Rhode Island claimed that she never accepted their decision. The line as run, finally in 1719, was 7 miles, not 3 miles, south of the Charles and, when Rhode Island discovered this fact in 1749, she attempted to bring suit before the British Privy Council. The poverty of the Colony and the coming of the Revolutionary war caused delay. In

land law that seizure and sale of land on a *fieri facias* passes title and that a return on an execution duly made at any time before trial is sufficient. In the case of the Bank of Alexandria v. Dyer, 14 Peters 141, Taney again interpreted a Maryland law, stating that the term "beyond seas," in the Statute of limitations as in force in Maryland and, consequently, in force in the District, did not exclude Alexandria, which was formerly in Virginia. In Brewer's Lessee v. Blougher 14 Peters 178, he held that the act of Maryland of 1825, declaring that illegitimate children were capable of inheriting from their mother, or each other, was not limited to the children of those capable of intermarriage, but also extends to the offspring of incest.

[89] 14 Peters 210.

1782 and again in 1818, Rhode Island took up the matter, but no line was finally determined. Massachusetts claimed from a monument erected in 1642 and insisted on the line of 1719. Her plea would have caused the case finally to be disposed of on an issue highly disadvantageous to Rhode Island; but as it set up both an accord and compromise and also undue lapse of time on the part of the defence, Taney, for the Court, said the plea was bad for duplicity.[90]

In 1841, Taney's opinions are not so important and in the most important case, that of the Amistad, he did not render the opinion.[91] He gave the Court's opinion in the Rhode Island-Massachusetts boundary case in which a demurrer by the latter State[92] was over-ruled. Taney said that lapse of time, sufficient to create a bar of limitations, might be taken advantage of by demurrer, but that the period of twenty years was not to be applied between States, where all the circumstances must be considered and the amount and kind of acquiescence ascertained. Two political communities are concerned, who cannot act with the same promptness as individuals, and the boundary was in a wild unsettled country, while the only tribunal in colonial days was on the other side of the Atlantic.[93]

[90] On land grants, see opinions in Lattimer v. Poteet, 14 Peters 4, where Taney concurred in the decision that North Carolina could not grant lands in the Indian country and that such grants were invalid; but dissented from the opinion, in that it found the Hawkins' line the true one established by the United States in accordance with the treaty of Holston (See Keene v.Whitaker 14 Peters 170).

[91] J. Q. Adams Diary 10, pp. 399, 431, 432. Story delivered the opinion, 15 Peters 513.

[92] 15 Peters 233.

[93] Other opinions of Taney at this term were: (1) Coons v. Gallagher 15 Peters 18. Under the Judiciary Act Section 25, the question mentioned must appear in the judgment below (an ejectment case) in terms, or by necessary

Groves v. Slaughter was an important case, involving the importation of slaves into Mississippi for sale. Clay and Webster were among the counsel and Justice Thompson delivered the opinion of the Court, in which it was stated that the power of Congress to regulate the traffic in slaves between the different States was not involved in the case. Justice McLean, however, in a concurring opinion stated his opinion upon that point. Taney was "not willing, by remaining silent, to have any doubt" as to his opinion upon the same point, but stated that, in his "judgment, the power over this subject is exclusively with the several States." He does not "argue this question;" but, states his opinion, "on account of the interest which a large portion of the Union naturally feel in this matter and from an apprehension that my silence, when another member of the Court has delivered his opinion, might be misconstrued." He, furthermore, refused to express an opinion as to whether the "grant of power to the general government to regulate commerce, does not carry with it an implied prohibition to the States to make any regulations upon the subject, even although they should be altogether consistent with those made by Congress." This question was "one step further out of the case really before" the Court, and may await the time when "some practical purpose is to be answered by deciding it."[94]

intendment, and it must also appear the decision was against the right claimed; (2) Ex Parte Crenshaw 15 Peters 119. A decree was revoked when the appellee, had not been cited as required by Act of Congress; (3) Lee v. Kelly 15 Peters 213 on final decrees and appeal; (4) Gwinn v. Breedlove 15 Peters 284, on reinstatement of a case. (5) Houseman v. Schooner North Carolina, 15 Peters 40 (a salvage case), Taney considered the conduct of the Captain in paying salvors and held that, by fraudulent conduct, they forfeited all claim for compensation and the act of the Captain should be repudiated.

[94] Groves v. Slaughter 15 Peters 449, 508–10. Biddle p. 147, said Taney showed anxiety to leave the whole subject of this peculiar domestic institution to the exclusive control of the States themselves.

In 1842, Taney's most important opinion was a dissenting one in the case of Prigg v. Pennsylvania,[95] a case which Henry Wilson in his "Rise and Fall of the Slave Power" styles as "dangerous." "From the only good part of the decision," Wilson considered Taney to dissent.[96] The antislavery men maintained that the Slave power took the decision in this case as a "new concession and guarantee."[97] Several opinions were rendered in this case and Taney disagreed with some of the majority's reasoning, though not with their conclusion.

Under the Constitution of the United States, the owner of a slave was clothed with entire authority in every State to seize and recapture his slave, whenever he could do so without breach of the peace, or any illegal violence. The fugitive slave act of 1793 was considered constitutional by the Court and, as the Pennsylvania Statute of 1826 was in conflict therewith, it was held to be void and a conviction under it was erroneous. The plaintiff's attorneys argued, "under the authority of the State of Maryland," and Story delivered the Court's opinion, showing that there was no division upon sectional lines. A negro woman slave had escaped from Maryland to Pennsylvania in 1832 and, in 1837, Prigg, as her owner's agent, caused a constable in York County to seize her. The magistrate, before whom the woman was brought refused to consider the case and Prigg then carried to Maryland the woman and her children, one of whom was born in Pennsylvania a year after her escape. The State of Pennsylvania sued Prigg for carrying away the woman.

[95] 16 Peters 537 at 626.

[96] I 470–473.

[97] 15 Atlantic Monthly 151. C. M. Ellis.

In the Court's opinion, which decided the case in Prigg's favor, Justice Story remarked that "few questions which have ever come before this Court involve more delicate and important considerations, and few upon which the public at large may be presumed to feel more profound and pervading interest." Slavery was a creation of municipal law and, without the constitutional provision, a free State might at once have freed each escaped slave within its borders—"a course which would have created the most bitter animosities and engendered perpetual strife between the different States." To prevent this condition of affairs, "this fundamental article" was inserted in the Constitution. Legislation was needed to "protect the right to enforce the delivery and to secure the subsequent possession of the slave." States cannot be compelled to enforce it, or to "provide means to carry into effect the duties of National Government." The law of 1793 is constitutional under the implied powers of Congress and the power depends exclusively upon the United States Constitution and hence is not concurrent with the States. The nature and objects of the provision in the Constitution require a uniform system of regulations. Taney disagreed with that part of the opinion which maintained that the power was exclusively a National one and held that the State authorities were not "prohibited from interfering, for the purpose of protecting the right of the master and aiding him in the recovery of his property." The Constitution merely prohibited the States from passing laws "impairing the right" and, consequently, the power of the States to "support and enforce" that right is "necessarily implied." Taney continued with the assertion, which has the true Federalist and Jacksonian ring, that "The Constitution of the

United States, and every article and clause in it, is a part of the law of every State in the Union and is the paramount law. . . . . Why may not a State protect an article of property acknowledged by its own paramount law? Other rights of property are protected for citizens of other States by the States." Why may not slaves be so protected? The delay of four years in passing the National law, after the Federal government was organized, confirmed his view. "The State officers mentioned in that law are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the State, and the State legislature has the power, if it thinks proper, to prohibit them. The Act of 1793 must depend altogether for its execution upon the officers of the United States named in it."

Congress never designed, in Taney's opinion, that a master should be compelled to go before a District Judge, but the act showed that the "cordial cooperation of the States was counted upon." Maryland had passed such a law which was continually appealed to, as fugitives, passing through the State on their way to Canada, were captured. The arrest and confinement of the fugitive were not necessary for the internal peace of the State, so that such a law is no police regulation, but one giving effect to the provisions of the Federal Constitution.[98]

Taney's other opinions that year were of little importance.[99] In two patent cases Taney wrote the

[98] Vide Tyler, p. 283.

[99] They were in the cases of (1) Fulton v. M'Affee (a question of procedure and jurisdiction) 16 Peters 149; (2) Kelsey v. Hobby (Liquidation of partnership, release and cross bills), 16 Peters 269; (3) Parish v. Ellis (Dower in Florida), 16 Peters 513; (4) Mills v. Brown (no jurisdiction existed in the Supreme Court,

opinion, in one of which the position was taken that a combination of three distinct things was not infringed by combining two of them with a fourth thing.[100]

In Martin v. Waddell[101] two justices dissented from Taney's opinion in a case of ejectment for one hundred acres of land covered with water at Perth Amboy in New Jersey. The principal right in dispute was the property in the oyster fisheries and the Court had to consider the rights arising under colonial grants from the Crown of England. After stating that "the English possessions in America were not claimed by right of conquest" from the Indians, who were "regarded as temporary occupants of the soil;" but "by right of discovery," Taney briefly summed up the English law on the subject of grants of fisheries but said that this had "ceased to be a matter of much interest in the United States, for when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common uses, subject only to the rights since surrendered by the Constitution to the general government." He then proceeded to examine whether the "dominion and propriety in the navigable waters and in the soils under them passed as a part of the prerogative rights annexed to the political powers conferred on the duke" of York by Charles II in his original grant. Taney held that the charter should not be construed technically, but as "an instrument upon

when it did not appear in the record that a Constitutional question was raised in the Court below), 16 Peters 525.

[100] Prouty v. Ruggles (a plough patent) 16 Peters 336, the other case was Carver v. Hyde 16 Peters 513.

[101] 16 Peters 367.

which was to be founded the institutions of a great political community." Consequently, the waters and the underlying soil were to be held as a public trust. The subsequent history of New Jersey showed that the people, until a very recent date, had enjoyed the rights of "fishery for shell fish, as a common and undoubted right," which the Court sustained against a claim of proprietary right.

In 1843 Taney's chief opinion related to a bequest of slaves in Maryland to a man, "provided he shall not carry them out of the State of Maryland, or sell them to anyone,—in either of which events, I will and devise the said negroes to be free for life." The Court held this to be a valid conditional[102] limitation of freedom to the slaves, which took effect upon a sale of them. A bequest of freedom to slaves in Maryland was considered a specific legacy. If the legatee had died without a sale or transportation, the petitioners would have continued slaves for life and the event was not too remote, nor was there an unlawful restraint upon alienation.

In another case,[103] a mortgage contained a power to a creditor to sell on breach of the condition, and a statute, subsequently passed by the State, gave the mortgagor twelve months to redeem the property and prohibited a sale at less than two thirds of its value. This law was held void, as impairing the obligation of a contract, since a denial of a remedy may constitute such an impairment.[104] Story[105] considered this case an important one and read Taney's opinion "with the highest satisfaction," regarding it as "drawn up with great ability" and as "entirely

[102] Williams v. Ash 1 Howard 1.

[103] Bronson v. Kinzie 1 Howard 311.

[104] Subsequent mortgages were subject to the laws.

[105] Tyler, p. 289.

conclusive." In writing to Taney concerning the case, Story expressed the hope that the "opinion was unanimous" and added that "These are times in which the Court is called upon to support every sound constitutional doctrine, in support of the rights of property and of creditors."[106]

In 1844, Taney delivered several rather important opinions for the Supreme Court. One of these opinions held that a Pennsylvania act imposing toll on carriages transporting the United States mail over the Cumberland Road,[107] violated the compact between the United States and Pennsylvania made by the Act of 1835, by which the State took possession of the road. The constitutional power of the Federal Government to construct such a road and the rights of the United States in the road, prior to the compact, were not involved in in the case. The State had a right to enter into a compact with the Nation to maintain the road. The contract was not one between individuals, but "between two governments, deeply concerned in the welfare of each other; whose dearest interests and happiness are closely and inseparably bound up together and where an injury to one cannot fail to be felt by the other." To tax the mails was to tax all of real value of federal

[106] The other cases reported in 1 Howard are unimportant: viz. (1) Smith v. Coudry 1 Howard 28 (collision); (2) McKnight v. Taylor 1 Howard 161 (Trust created for the payment of creditors—the right began to sue in April 1818 but no steps were taken until August 1837—equity will not intervene after such an unaccounted for delay); (3) Jewell's Lessee v. Jewell 1 Howard 219 (marriage in Georgia or South Carolina, *per verba in praesente*, Court equally divided); (4) Bank of Metropolis v. N. E. Bank 1 Howard 234 (negotiable paper); (5) Nelson v. Carland 1 Howard 265 (Procedure under bankruptcy act); (6) Taylor v. Savage 1 Howard 282 (On removal of executor and appointment of an administrator *de bonis non*); (7) Minor v. Tillotson, 1 Howard 287 (writ of error). In 2 Howard, for some unascertained reason, I find no opinion by Taney.

[107] Searight v. Stokes 3 Howard 151.

property over the road, except for occasional military use. The United States had, "unquestionably, a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property, as well as that of its citizens committed to its case." The United States, however, could not claim exemption for more carriages than those necessary for the "safe and speedy and convenient conveyance of the mail," and other property or persons in the same vehicle with the mail were held not to be exempt from toll.

In another case, in which an act of Ohio was considered[108] imposing toll on passengers on the Cumberland Road travelling in mail coaches, Taney held that the toll imposed on the United States part of the burden of support of the road, contrary to the contract between Ohio and the United States, especially since passengers in other vehicles were allowed to go free.

In Kendall v. Stokes[109] the Court held that a public officer was not liable in an action for an honest mistake, made in a matter where he was obliged to exercise his judgment, even though an individual may suffer through this mistake. An application by a private person for a mandamus proceeds on the ground that he has no other adequate remedy and, after the mandamus has been awarded, an applicant cannot have an action in the case for the same cause, though he may have one for a disobedience of the mandamus. After an award and the receipt of the money awarded, an action for the original cause cannot be maintained on the ground that the claimant did not claim, or prove before the referee, all the damages sustained. If the Postmaster General

[108] Neil v. Ohio 3 Howard 720.

[109] 3 Howard 87.

wrongfully refuses to give credit to a contractor and the latter should be entitled to an action for damages, he cannot recover special damages (beyond interest) for the detention of the money. Kendall acted wrongly, but in good faith, in witholding payment for a claim upon which his predecessor had acted finally.

Another case involved Maryland's subscription of a million dollars to the Baltimore and Ohio Railroad, provided that, if the road should not pass through certain towns in Washington County, the Company should forfeit the subscription to the State to be used for Washington County.[110] Biddle remarks[111] that the "reasoning of the Chief Justice in this case is marked by breadth of view and intelligent discrimination and the application of sound principles of law to the case." The Railroad had assented to the above named condition, as a part of its charter. The Court held that the law inflicted a penalty, that nothing was due to the company by contract, and that the State could release and had released the penalty, by a subsequent Act. The Act of 1835 had been repealed in 1840, and the language of the former act was not that of a contract, but was mandatory and in the exercise of legislative power. In the course of the opinion, Taney said that public corporations were created for purposes of government and that counties were only certain portions of territory into which the State is divided for the "more convenient exercise of the powers of government."[112]

A number of tariff decisions were made by Taney at this term of Court, interpreting the act of 1842.[113]

[110] Maryland v. B & O. R. R. 3 Howard 534.

[111] Const. Hist., p. 159.

[112] Stimpson v. Westchester R. R. C. another railroad case, involving a writ of certiorari, 3 Howard 553.

[113] (1) Aldridge v. Williams, 3 Howard 1 (Appraisal of exports); (2) Curtis v. Martin, 3 Howard 107 (Duty on cotton bagging); (3) Swartwout v. Gihon 3 Howard

In 1845, Taney's only important opinion was one concerning the country occupied by Indian tribes and not included within the boundaries of any State.[114] As to such territory, the Court held that Congress had power to enact a law to punish offences committed either by whites or Indians. A white citizen of the United States, who had been adopted and domiciled by the Cherokees, was not considered to be an Indian; but could be tried for murder in the United States Court for the District of Arkansas.[115]

"The native tribes," in Taney's words,[116] "who were found on this continent at the time of its discovery, have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out and granted by the governments of Europe, as if it had been vacant and unoccupied land and the Indians' territory held to be and treated as subject to their dominion and control." The United States

110 (a verbal protest against an illegal exaction of duties is sufficient). Minor miscellaneous opinions were in the cases of: (1) Savage's Assignees v. Best, 3 Howard 111 (In Kentucky, delivery of a *fieri facias* to a sheriff creates a lien on debtor's lands as valid as though a levy had been made on them); (2) Nugent v. Boyd, 3 Howard 420 (Bankrupt law, dissent); (3) U. S. v. Hodge, 3 Howard 534 (procedure); (4) Brown v. Hunt, 3 Howard 650 (land patent, dissent without opinion); (5) Wilson v. Smith, 3 Howard 763 (Collection of bill); (6) Winston v. U. S., 3 Howard 771 (Motion to dismiss suit); (7) Ross v. Prentiss, 3 Howard 771 (Limit of jurisdiction); (8) U. S. v. King, 3 Howard 773 (Spanish land grant in La.), Biddle (Consti. Hist. p. 161) writes that the decision in the last case (The same case came up again in 7 Howard 833), "although doubtless bearing hard occasionally upon innocent purchasers for value, contains the only true solution of the difficulties surrounding such grants."

[114] U. S. v. Rogers 4 Howard 567.

[115] Biddle, Const. Hist. p. 159, calls this opinion a "brief, lucid, and forcible discussion" of the rights of Indian tribes.

[116] page 572.

Government has exercised its power over them "in the spirit of humanity and justice. But had it been otherwise, it is a question for the lawmaking and political department of the government and not for the judicial. . . . . It is our duty to expound and execute the law as we find it." In such firm language, does Taney express the doctrine of the separation of powers.[117]

The great case of Rhode Island v. Massachusetts came up for final decision at this time. Taney had dissented in the preliminary decision[118] but now[119] he concurred in holding that Massachusetts won the dispute.[120]

Taney's official life was not altogether confined to the Bench. On February 24, 1845, he wrote to his wife[121] that

> The Court in a body, with Marshal, Clerk and Reporter, waited on President Polk, on last Wednesday morning, in due form. We were, as you may suppose (that is, the President elect and myself)

[117] Minor opinions at this term are (1) Tombigbee R. R. v. Kneeland, 4 Howard 17 (affirms Bank of Augusta v. Earle); (2) Spalding v. N. Y., 4 Howard 21, (Bankruptcy law), (3) Maney v. Porter, 4 Howard 55 (Jurisdiction; (4) Agricultural Bank of Mississippi v. Rice 4 Howard 225 (Married woman's deed); (5) Aspden v. Nixon, 4 Howard 467 (Dissent without opinion. Effect of Chancery Decree); (6) Barry v. Mercein, 4 Howard 574 (Procedure). In a case from Florida, he delivered an opinion to the effect that the control of the records of the Territorial Court of Appeals of that State belongs to the United States, and not to the State, and that the Supreme Court would not issue a writ of error to a court no longer in existence. Hunt v. Palao, 4 Howard 589. In Gwinn v. Holliday, 4 Howard 1, the Court held that, if an execution creditor authorized a Deputy Marshal to receive in payment of a debt other currency than gold or silver, the latter acts as agent of the creditor and not as deputy marshal, so that the marshal is not responsible for his acts.

[118] In 12 Peters.

[119] 4 Howard 591.

[120] He filed a separate opinion, but said nothing as to the merits of the case and was not even present at the elaborate arguments upon the evidence.

[121] Tyler, p. 472.

glad to meet here again under such circumstances, and talked about old times, as much as we could in the five minutes we were together. I have not yet been able to wait on Mrs. Polk; but must do so before I leave Washington.

In the evening, we went to President Tyler's. There must have been, I think, a thousand people there—well-dressed, well-behaved people, for none others were there. You know the President and I are good friends, and he and Mrs. President received me with great kindness; and I met there more old friends, and spent a more pleasant evening than I expected; except only that I was greatly oppressed, as I always am on such occasions, by the crowded state of the rooms. . . . . President Tyler's Cabinet were all there; but I suppose you have heard that they are all to go out, as soon as Mr. Polk comes in. But we do not yet know who will come in; and I am too busy in Court to make many inquiries.

During these ten years, many changes had taken place in the membership of the Court. Barbour had come upon the Bench about the same time as Taney, but had died suddenly in 1841 and had been succeeded by Daniel. Catron and McKinley had been appointed in 1837, when the number of judges was increased to nine.

Story was still dissatisfied with the principles upon which the Court's decisions were being based and in a tone of profound melancholy wrote a friend, the Hon. Ezekiel Bacon, in April, 1845.

I have been long convinced that the doctrines and opinions of the "Old Court" were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the Constitution, so vital to the country, which in former times received the support of the whole Court, no longer maintain their ascendancy. I am the last member now living of the old Court and I cannot consent to remain, where I can no longer hope to see those doctrines recognised

and enforced. For the future, I must be in a dead minority of the Court, with the painful alternative of either expressing an open dissent from the opinions of the Court, or, by silence, seeming to acquiesce in them.[122]

In this state of affairs, Story had decided to resign his seat on the Bench and devote himself entirely to his law professorship in Harvard University, when his death came, on September 10, 1845.

His relationship to Taney had always been one of "the most intimate friendship." They were frequent correspondents, both upon official and personal matters, and this friendship extended on the part of Story to Taney's family also. He never passed through Baltimore, without paying his respects to Mrs. Taney, either in person, or by a note expressing his regret that he could not call. He condoled with Taney and his wife over the death of Francis Scott Key, which loss to the Chief Justice and his wife was "irreparable and to the public, in the truest sense of the word, a deep calamity." He wrote Taney of his hopes to take a journey to England and of his health. He fully appreciated Taney's ability and learning.[123]

Shortly after Story's death, Taney wrote Mr. Peters, the Court Reporter, thus:

What a loss the Court has sustained in the death of Judge Story. It is irreparable, utterly irreparable in this generation; for there is nobody equal to him. You who have seen me sitting there for so many years between Story and Thompson will readily understand how deeply I feel the loss of the survivor of them, especially so soon after the death of the other.

[122] Tyler, p. 285.
[123] Tyler, p. 288.

At the opening of the succeeding term of the Supreme Court in the memorial proceedings, Taney said:

It is difficult for me to [124] express how deeply the Court feels the death of Mr. Justice Story. He held a seat on this Bench for so many years and was so eminently distinguished for his great learning and ability, that his name had become habitually associated with the Supreme Court, not only in the mind of those more immediately connected with the administration of justice; but in that of the public generally throughout the Union. He had, indeed, all the qualities of a great judge, and we are fully sensible that his labors and his name have contributed largely to inspire confidence in the opinions of this Court and to give weight and authority to its decisions. His legal works had made him known wherever juridical knowledge is esteemed and cultivated . . . . but it is here on this Bench, that his real worth was best understood and it is here that his loss is most severely and painfully felt. For we have not only known him as a learned and able associate in the labors of the Court, but he was endeared to us as a man, by his kindness of heart, his frankness, and his high and pure integrity.

[124] Story's Story II 632, 633.

CHAPTER X

Friendship with Jackson and Private Life (1836–1846)

On March 17, 1836, John Forsyth, Secretary of State, sent Taney his commission as Chief Justice of the United States.[1] This official intimation of the confirmation by the Senate of the nomination which Jackson had made, was not the first knowledge which Taney had of the matter, for "many" of his "friends had written" him concerning this event, and their letters had been received by him on the sixteenth. On the seventeenth, Taney wrote from Annapolis to Jackson a letter which I dislike to quote, for it is a very regrettable one, showing narrowness, vindictiveness, and rancor. He told the President that

> I feel that the first letter I write after the receipt of this intelligence should be addressed to you, to express the deep sense I shall ever retain of the constant kindness with which you have supported me, until you have finally placed me in the high station which I now fill and which is the only one under the government that I ever wished to attain.

His loyalty to Jackson was admirable and perfect, and the jurist continued:

> There are, indeed, circumstances connected with my appointment, which render it more gratifying than it would have been in ordinary times. In the first place, I owe this honor to you, to whom I had rather owe it than to any other man in the world, and I esteem it the higher, because it is a token of your confidence in me.

[1] 13 Md. Hist. Mag. 166.

In the second place, I have been confirmed by the strength of my friends, and go into the office, not by the leave, but in spite of the opposition of the men who have so long and so perseveringly sought to destroy me, and I am glad to feel that I do not owe my confirmation to any forbearance on their part, and it is, also, not a little pleasant to find that Mr. Kendall, with whom I have passed through so many trying scenes, and who shared with me so largely the vindictive persecution of the panic, was, in the same session of the Senate in which I was confirmed, and in the same hour, placed firmly in the high station to which you have called him, and which he is so entirely worthy to fill, and that he is no longer in the power of those who have sought and still seek to make him one of the victims of their vengeance, and it is a still further gratification to see that, if providence spares our lives, it will be the lot of one of the rejected of the panic Senate, as the highest judicial officer of the country, to administer, in your presence and in the view of the whole nation, the oath of office to another rejected of the same Senate, when he enters into the first office in the world, and to which it is now obvious that an enlightened and virtuous people are determined to elect him. The spectacle will be a lesson which neither the people nor politicians should ever forget.[2]

Taney's political connection with Jackson's administration continued until its very end. He sent a paper, on June 20, with the request that Major Donelson acknowledge the receipt of it, as Taney had not entire confidence in the Post Office. The paper was written in Washington, and was a draft of a veto message of a bill for the charter of banks in the District of Columbia, for which Jackson had asked Taney. Taney endorsed on the draft, however, "as no constitutional question is involved, and the responsibility properly in such cases as this, belongs to Congress, I respectfully advise that it is not, under pres-

[2] Amos Kendall had been appointed Postmaster General, and the Senate had formerly rejected the nomination of Van Buren as minister to England.

ent circumstances, a case fit for a veto." Taney was about to take a steamboat for Delaware at 6.00 a.m. on the morrow, and so could not copy the document fairly, but sent it with interlineations. He believed the position sound, and that Jackson was right. He did not like to see Jackson in another controversy, but added: "Men think differently, you must decide." If Taney had more time given him, he would have presented his views upon other subjects which Jackson may discuss, if the bill to deposit the surplus revenue with the States ever come to him—such subjects as: (1) there is no surplus; (2) the distinction between an "accidental and a systematic surplus" which had already been made in Jackson's previous messages, especially in the first veto of the land bill; (3) the desire to have a surplus would have an injurious effect upon legislation, which desire had already caused forts to fall into decay before completion and had crippled the navy (these proofs, arising from experience, of the disadvantage of having a surplus to distribute, ought to convert dissidents); (4) the consequences which follow the relation of creditor and debtor between the United States and the States, and the impossibility of requiring a repayment, for the people in the States should not be taxed to pay themselves in the general government; (5) the wild measures and spirit of speculation afloat "would be encouraged by the division of public money and the struggles to obtain it would engender corruption." The bill was passed, and the only reason that its effects were not fully as bad as Taney feared, was that the troubled condition of financial affairs soon put an end to the surplus. A week later, on June 27, when Taney had returned to Baltimore from holding court in Delaware, he wrote again, stating that the argument he had

sent was grounded altogether on the position that the Senate bill "proposed, in effect, a *loan* to the States, or an *investment in their stocks*, and not a *deposite* of the money of the United States in the true and proper sense of that word." The amendment to the bill made by the House of Representatives, removed that objection and made the States depositories. There was no constitutional difficulty in the bill, but it was only bad policy. Consequently, Taney repeated his recommendation that the responsibility be left on Congress and no veto message be sent. The policy of the bill appeared to Taney "most unfortunate and mistaken;" for, if Congress may "raise a revenue beyond the wants of the General Government, and may deposite the money, where they please, either with a state or a corporation, and may suffer that money to remain there to the end of time, while they are raising more to add to it, I see no limitation whatever to the powers of the general government. . . . . By continuing to collect a revenue, which they admit they cannot employ usefully for the purposes of the general government, they assert, in effect, unlimited power of taxation." "The friends of a strict construction of the powers of the general government," Taney continued, will find that "they have placed themselves in difficulty," and cannot get money back from the States, for the impression had been made that "it is never to be recalled and so they sanction a principle opposed to their construction of the Constitution." "It will be no easy matter," in the writer's opinion, "to set limits to the powers of government, which may raise what money it pleases, and apply it indirectly to what purposes it pleases, by depositing it with a State, or a corporation, or an individual, with the understanding that it is

never to be recalled." "Every political friend" with whom Taney had spoken, regretted the bill, yet thought Jackson was right in "not vetoing it, from the vast majorities by which it was passed."

Politics in Maryland were at a white heat in 1836. The large counties, in which the Democratic party was strong, insisted on a larger representation in the legislature, and, when they could not obtain what they believed should have been granted them in the regular constitutional way, revolutionary measures were discussed.[3] Taney discountenanced any extra constitutional steps, and, although in September, Frank P. Blair[4] wrote him that his attitude was "causing the opposition to make great headway against our friends in Montgomery County," he declined to change his position.[5]

On October 15, 1836, Jackson wrote Taney concerning his farewell address. When would be the most opportune time of presenting it? At the beginning or the end of the Congressional Session? What topics should be introduced? and "what range should it take?" for example, ought not "Our glorious Union" be treated as "permanently important," the dangerous power of the United States Bank and "privileged monopolies generally" be discussed, and the "gradual consuming corruption" in legislatures, through the "paper system," be condemned?

It was not merely the desire to vindicate a friend and adherent that had led Jackson to appoint Taney Chief

[3] Tyler, p. 246.

[4] 13 Md. Hist. Mag. 166.

[5] For full discussion of the political situation in Maryland at this time, see Steiner's "Electoral College for the Senate of Maryland and the Nineteenth Van Buren Electors" in American Historical Association Proceedings for 1895. pp. 129–167.

Justice. He had learned to lean upon the Marylander's advice and opinion. The popular judgment[6] might have designated Story to succeed to Marshall's place, through his ability, worth, and reputation, and his early championship of the Republican party in New England, but Jackson believed too thoroughly in Taney to give the great position to any other man. Taney replied to Jackson, on October 27, that he would have his suggestions for a farewell address ready by January 1. He was pleased to see the success of Jackson's measures and believed that the Treasury order, requiring that the payments for public lands be made in specie, had saved the West from bankruptcy and ruin. The order had been a benefit to the Atlantic States also, making the banks adopt a more cautious policy. That pressure, concerning which complaint was made, would have been far more severe without that order, and, in any case, the disturbed situation of the money market in England would have been felt in the United States. "The main cause of the evil here," in Taney's opinion, "is unquestionably, the sudden and exorbitant increase of paper currency," through the "immense increase of its issues by the Bank of the United States in the last months of its existence." This increase created a "craze for wild and mad speculation." The Bank tried to produce trouble, and influence the Presidential election, and had "not abandoned its designs to obtain control of the general government." The deposit bill also caused trouble, for "the greater part of the surplus revenue had been loaned merchants in commercial cities and the mere transfer of it from the banks which had loaned it to others," for a time "withdrew it from commercial operations." The newspapers, in-

[6] Cf. III Parton's Jackson 559.

fluenced by the merchants, were most clamorous for the measure, and now reap the fruits." It was a repetition of their folly in 1833 and 1834. Then they tried to throw the blame for financial disturbances, now they threw the blame on the Treasury land circular. There was no foundation for either charge. The merchants, as a class, were obviously "led astray by political leaders more easily than any other class of citizens." "The currency," he concluded, will be "always liable to these ruinous fluctuations, while it continues to be of paper." No notes should be issued under "twenty dollars, and fifty would be better." The States will not prevent the issue of smaller notes, so Congress must do so.

In November, Taney wrote Jackson twice, in reference to Federal appointments in Baltimore, for he continued to be the administration's political adviser in these matters. The earlier of these letters, written on the 18th, has not been found, but the second letter, written a day later, states that further inquiry made Taney feel that he was correct in the advice contained in the former epistle. The appointment, as collector of the port of Baltimore, of either Frick[7] or White would be a good one, and as "well received as could be expected, where so many will be disappointed, let who will succeed." Mr. Frick had been an "active politician for many years, and a man of high standing. He was a Jacksonian presidential elector in 1832, and a candidate for elector in 1836. He had

> mixed much with the people, especially with those who take an active part in political concerns, is a popular man, and, I think his appointment would be more generally acceptable in the first

[7] Frick was doubtless William Frick, a lawyer, White was John White.

instance than that of Mr. White, whose situation as a cashier of the Branch Bank has precluded him from mixing much with the people, or taking an active part in political contests. But the high character of Mr. White, his undoubted qualifications for the office, indeed, I may say, his peculiar qualifications, would, I have no doubt, make his appointment, after a little time, perfectly acceptable to the great body of our friends. . . . . The intimate knowledge of the commercial community, which he must have acquired as cashier, would be exceedingly valuable in a collector, who is constantly called on to decide on the sufficiency of the suretys offered on duty bonds. He is moreover, greatly esteemed and respected by this community, and no one can doubt his integrity, his firmness, or his entire fitness for his office.

The aged General Samuel Smith had been suggested for the collectorship. Taney thought that this "appointment would not be complained of," on account "of his long public services," Yet it "would not be acceptable to our friends generally." Smith was one of "a small number" in Baltimore who favored McLane as Jackson's successor. He was so opposed to Van Buren that he did not make up his mind to vote for him, until the preceding summer, and was "never regarded as cordial in his support." Furthermore, Smith was Mayor of the City, and, if that office should be vacated, the opposition might carry the election for a successor, since "matters have been sadly mismanaged here, and the party is not united as it should be." The great body of Jacksonians "are not willing that General Smith should be appointed, and have not confidence in him," yet none of Jackson's "real friends would complain," in the event of Smith's appointment.

Carr[8] had also been suggested, but Taney felt there were "strong objections" to him. He was honest, but

[8] Carr has not been identified.
John K. Law was the Collector at that time.

"manages his own money concerns very badly," and does not, by any means, stand high for prudence, or punctuality, in money affairs. The handling of public money might benefit him, besides, it is understood that, if appointed collector, he has agreed to retain in office the son of the late collector—a "political opponent" and, therefore, he is recommended by merchants who are "our bitter opponents." The son referred to is a "very worthy man and an excellent officer." Taney had "no desire to see him removed," but thought that the collector ought to take his office unhampered by pledges.

Lyde Goodwin[9] was a fifth candidate, but his "necessities and indiscretions in money matters seem to form, in the opinion of our friends here, insuperable objections" to him. He "would not have the confidence of the public." Wilmer,[10] sixth candidate, was unfit. "The Convention" had presented the name of a seventh man, Samuel Harker.[11] It would be an "extreme indiscretion," in Taney's opinion, to name him, for "you can hardly imagine a man more unfit and more unworthy of such an office." In fine, Taney advised delay in making the appointment.

In the beginning of December, Jackson sent Taney a copy of his annual message, together with a "kind note,"[12] asking an opinion upon the message and Taney's views upon the farewell address, which note Taney acknowledged on the 8th. Taney found that the message was making a "strong impression" in Baltimore, and he trusted the impression would be a durable

[9] Lyde Goodwin is given in the "City Directory" for 1835 without occupation.

[10] Wilmer was probably L. A. Wilmer, painter.

[11] Samuel Harker was editor of the "Baltimore Republican."

[12] 4 Md. Hist. Mag. 304.

one. The arguments on the "deposite law" and on the currency were found to be "clear and decisive." The reference to the first United States Bank was "one of those historical recollections that should often be recalled." Taney also thought that the "wisdom and foresight of your Treasury order as to specie payments for the public lands is becoming every day more manifest." Without it, "pressure would have been greater and there would have been an explosion of Western banks."

The Circuit Court's session would end on the following Monday, and Taney could then turn his thoughts to Jackson's farewell address. Taney rejoiced that Benton was pressing forward his "expunging resolution" and that Jackson's health was better, so that he may "witness the happiness of a grateful people."

During the recess of the Supreme Court, on January 27, 1837, Taney wrote Jackson an acceptance of a dinner invitation to the White House, and congratulated the President on his "proud and noble triumph, in which an indelible and enduring mark of reproach, which a faction endeavored to fix upon you, has, by the command of millions of people, been stamped upon their own foreheads." This grandiose sentence referred to the passage of Benton's resolution by the Senate, expunging from its records the resolution condemming Jackson for his conduct relative to the removal of the deposits from the Bank of the United States.

The relations between the President and the Chief Justice continued to be very intimate, until the very end of the administration. The idea of Jackson's Farewell Address, probably, took its inception from Washington's. The paper was composed by Taney, whose ideas

were identical with his chief's.[13] On February 9, Jackson wrote a curiously formal note:[14]

> The President with his respects to Chief Justice Taney, and being informed by Mr. Blair that the Supreme Court will adjourn on Saturday next, The President requests him to come and take a room with him during his stay. The President will have the room warmed on Saturday, if Mr. Taney will be here on that evening to occupy it.

After retiring from the Presidency, Jackson lived for eight years at his plantation, the Hermitage, near Nashville. Once or twice every year, Taney wrote him long letters, to which most of the replies have not been found and two of Taney's letters seem to have been destroyed. The Chief Justice was no traveller, and I find no record that he ever went anywhere, except to hold court, or to spend a summer at a Virginia watering place. But he always had it in mind to visit Jackson, and it is pathetic to see how, in one letter after another, he states that he has been obliged to defer the consummation of this desire. The letters also show clearly that the intimacy was not merely between the heads of the two households, but that the ladies and children partook of the friendship.

After Van Buren's inauguration, the first of the long series at which Taney gave the oath to the Chief Magistrate, Jackson stopped to visit Taney in Baltimore, on his way to Tennessee.[15]

Shortly after the administration of Van Buren began, Taney wrote him on April 1, 1837, from Baltimore[16] and

[13] Tyler, p. 409

[14] 13 Md. Hist. Mag. 160.

[15] III Parton's Jackson, p. 629.

[16] 8 Md. Hist. Mag. 317. Van Buren had written Taney about an appointment to Federal office and Taney gives his opinion of —— Murray.

expressed pleasure that he had left "the special treasury untouched," for any change would have produced "an expansion of the paper currency." On April 30 a second letter was written to Van Buren, asking that he write prominent Baltimoreans to prevent them from becoming discontented; a third letter, dated July 20, answered Van Buren's questions in regard to the proper measures which should be taken to meet the financial situation and to secure the resumption of specie payments by the banks. Taney disapproved of keeping the public money in the Sub-treasury, and thought that "the banks never will resume specie payments," until the merchants were compelled to pay their bonds on goods imported from foreign countries. Taney then referred to the attack made upon him by Clay, on account of his being a stockholder in the Union Bank, and apprised Van Buren that "I'd not now hold a single share of stock in any bank, nor do I owe any Bank a single dollar."

The first of these letters by Taney to Jackson was written in Baltimore on July 3, 1837. Taney had rented a "pretty little place" three miles from Baltimore for his family for the summer. All the family had been ill during the preceding winter. He already meditated writing a never-to-be-written "history of the panic year," but must visit Jackon before beginning work upon it. Like King Charles's head in the novel, the Bank of the United States, that prime villain, figures largely in the epistle. Since that institution had secured a Pennsylvania charter, Taney was certain that it was "busy in preparing for the overthrow of the State Banks, and operating with all its power to produce disorder and confusion in the currency." He felt sure that the "Bank is the concentrated power of the

whole class of the moneyed aristocracy, who have so long struggled to get possession of the government," and he was also sure that, "without the aid of paper money, the moneyed aristocracy will have no more than their fair share of power." A hard money man, Taney held that the struggle was one for the victory of paper, or of silver and gold. He believed that the "great body of the people thought but little on the currency," until Jackson's measure called their attention to it. The "discussions engendered" thereby will show the people how to understand the question, and, "if our friends at Washington" stand firm, "the intelligence of the people will carry them through. But we have a severe contest, and money will be poured out like water to accomplish the object of the bank," which had regained ground through the "worse than folly of our friends in Pennsylvania." Taney almost wished that he was again with Jackson in Washington, to fight the battle out to the end. "A paper currency, in any form, or in any shape, should be resisted with inflexible resolution." It was absurd to talk about a "sound and stable paper currency. . . . . From the nature of man, such currency must always be fluctuating in value. Nothing will do as a measure of value, but a metallic money, which has of itself real and intrinsic value." Formerly, Taney had thought that banks might be permitted to issue $20 notes, but experience and observation of the Bank of England, had convinced him that "there will be no safety short of $50, and perhaps $100 would be better. A $50 note is seldom asked for, except for the purpose of remittance and exchange." If notes were limited to these large ones, merchants would "still have the system of credits with each other by means of exchange," and would sometimes speculate

and fail, but "their means of gambling at the expense of the great body of the people, would be taken away" and these merchants could not then, "by breaking the banks, where they must always exercise absolute control, debase the currency, and, by that means, throw their losses upon other people." The "present embarrassment in government revenues never" would have occurred, in Taney's opinion, "if our friends in Congress, in the deposite law," had adhered to Jackson's rules, when "deposites" were first removed from the Bank. By their hurry to get hold of the surplus, however, they took away the control of the government over its own funds, and left them and the currency "at the mercy of men who had, for years, been endeavoring to destroy both." In addition to the provisions for distribution in that bill, there were two other fatal ones: (1) their prohibition of "any deposite in a bank of more than one fourth of its capital," and (2) a charge of interest "on deposites." When Taney left the Treasury, there were 20 deposit banks, now there were 90 and this "vast and ruinous increase was forced" on the President by that clause. "When confined to a few respectable banks, the government could keep a strict supervision over them" and the officers of such banks were "anxious to maintain their superior rank in the public estimation and to preserve the confidence of the government." When Taney wrote, however, the "revenue of the nation" had become mixed up with the "general rag money currency, feeding and stimulating the spirit of speculation in every quarter. The circumstance of being a deposite bank ceased to be an honorary distinction."

Furthermore, as soon as interest was asked, the Secretary of the Treasury would no longer require the

banks to keep the deposites in specie, whenever he saw that imprudence "was leading them astray." They had the "right to make interest by lending out the money. It was, truly, no longer a deposite, nor were they deposite banks. It was, to all intents and purposes, a loan of the public money." The Federal Government collected its dues in "hard money," and converted "them into paper, and very bad paper, too, by lending to banks." The money was put to "hazard for the miserable gain of 2 per cent." Jackson had agreed with Taney, when the bill passed, but felt the objections were not sufficient for him to veto it. "Money paid to the government, ought never to be connected in any degree with trade or exchange, but to be held by the agents . . . . as a sacred deposite and never to be touched except for the purposes for which the government is authorized to collect it."[17]

On October 9, 1837, Taney wrote Jackson again from Baltimore. He was still living, "quite retired," in Baltimore County with his family, and did not expect to return to town until driven thither by cold weather, for which the house they occupied was not fitted. He had not kept in touch with "our leading politicians," but was sincerely sorry to find discord among the friends of the administration, in regard to the measures called for by the "country's exigencies." He was pleased with the "manly frankness and ability" of Van Buren's message to Congress, as well as with the "soundness of its principles." If Congress had followed his advice, there would have been no more trouble with the Bank of the United States. Taney regretted that Woodbury, the Secretary of the Treasury, had recommended

[17] He blamed Judge White strongly for the enactment of the bill with these defects.

the issue of Treasury notes not bearing interest, for these would be a "paper currency upon the credit of the government, and every paper currency, whether issued by the government or by corporations, will run into excess sooner or later." Interest bearing notes should be issued, which will not circulate as currency. Gold and silver could be raised on them. "If the government owes money which it cannot, at this moment, pay, it is bound in honesty, like an individual in the same situation, to pay interest to its creditors whom it compels to wait." Taney did not believe that the banks would restore specie payments, unless the importing merchants were compelled to pay their bonds, for banks are "necessarily under the control of the merchants." Together with the Bank of the United States, he was convinced, that these merchants compelled the New York banks to suspend specie payments. Banks elsewhere cannot resume them, until New York ones do so.

An important election had recently taken place in Mayland. Taney wrote: "I, of course, take now no active part in election arrangements, further than to give my vote. But my friends tell me that there was no concerted effort by them to obtain possession of the government of the State." In spite of this, since the people understand who are the "real authors of the present embarrassments of the country," there will be 16 more "friends of administration" in the next House of Delegates than in the last.[18]

After the close of the Circuit Court's term and awaiting the assembling of the Supreme Court in January, 1838, Taney felt[19] that he could use his intervening leisure in

[18] In this letter Taney requests that Jackson send him a copy of his letter to Jackson at the Rip raps in August, 1833.

[19] On December 19, 1837.

no better way than in writing to Jackson to express his best wishes for the New Year. Having returned to Baltimore with his family, he proposed to write his memoirs, so as to show from official documents that his conduct in "the removal of the deposites" was "frank and decided."

The generally unfavorable result of the elections, showed him that another great struggle was on hand to recharter the United States Bank, but in Taney's opinion, "if our friends in Washington are judicious, I think they can hardly be defeated." He could not "entirely approve of the course pursued by our friend, Woodbury," as to the Treasury notes, thinking it wrong to issue notes at 2 per cent—a nominal interest. "A government ought never to pay its creditors in a currency below gold or silver, if it has the means of doing otherwise. For public confidence is always liable to be shaken in the administration, when the public securities are depreciated." His opinion was unwavering, that the "real public disease is an over abundance of paper currency." Treasury notes should have been issued at 6 per cent interest, and they would have served for investment, as well as for exchange, and "would gradually have brought specie out." "The more frequently and commonly it is seen, the sooner," in Taney's opinion, "will confidence be restored to the solvent banks—the better able to resume." The public creditors would not then have been compelled to accept depreciated currency, but Taney had recently seen at the Circuit Court, the United States Marshal "paying jurors and witnesses summoned by the United States in paper trash, as low as halves and quarters." Taney continued that "most of the jurymen in the Circuit come from the country, and their *per diem* allowance does not

support them." "Compelled to come against their will, they take no pleasure in being paid off in such currency, when they know that the merchants receive their debentures and Congressmen their *per diem* in gold and silver." Taney concluded the subject with the statement that: "I write more of politics to you than I usually talk, for I was so long with you and the currency during that time so much in our thoughts."

On April 14, 1838[20] Jackson wrote Taney a long letter, in response to a lost one of his, written on December 19, 1837. Jackson fully appreciated "the talented and energetic aid" he received from Taney and Kendall and believed that their "firmness of character" and "high talent" had made them the target for the "hatred and calumny so bitterly displayed against you and myself." He agreed with Taney's views that the policy of issuing Treasury notes was a bad one and of doubtful constitutionality.

Taney wrote Jackson, on May 28, 1838, to express his regret that he could not come to the Hermitage during the coming summer.[21] He stated that he was kept in Maryland by duties as trustee for the settlement and distribution of his father's estate. "Nothing so soon gets into confusion, or requires more time and patience to set to rights again," Taney wrote, "than the accounts of a trust estate, in which many are interested." While Taney was a member of the cabinet, nothing had been done concerning these matters; but he must take them

[20] Md. Hist. Mag. vol. 4, p. 305. Jackson expressed his hope for a visit from Taney.

[21] On May 1, 1838, Taney wrote George Hughes from Washington, to ask him to find a place for an unnamed poor young relative of his, whose father was dead. The youth had been partly educated at Edinburgh, and possessed industry and "the best disposition," although he was not of a "high order of intellect." Mss. in N. Y. Public Library.

up as soon as he shall return from Delaware, whither he expected to go on the morrow, having concluded the sitting of the Circuit Court in Baltimore, on the 26th.

He hoped to employ his "summer season of leisure" in sketching scenes in Washington during the "panic year," and had begun to do so in the previous fall; but, during the winter, his court duties had been "exceedingly laborious."

He could not refrain from the discussion of politics, and was sorry that affairs "go on badly with our friends at Washington" and that there existed "a want of confidence in the management of the Treasury Department." He did not think that the "stoppage of specie payments" hurt the administration and the elections of last October in Maryland showed that "our friends" were stronger than for many years past, but ground had been lost since that time.

"The greatest harm," came, according to Taney's judgment, "from paying out bank notes and depreciated treasury notes to the creditors of this government, especially to those whose claims arose from burdensome duties, such as jurors, witnesses, etc." He repeated his belief that Woodbury should have issued notes, bearing six *per cent* interest at first, and soon would have received specie in return for them. People do not like to see the Congressmen paid in specie and others in notes of banks. Taney hoped that Woodbury would accept the position of Chief Justice of New Hampshire, which he understood was offered him; "for he is an honest man and a good lawyer and will, doubtless make a most diligent judge, and I fear he is altogether unfortunate in his plans where is now is."[22]

[22] Levi Woodbury (1789–1857) succeeded Taney as Secretary of the Treasury in 1834. He was appointed to the Supreme Bench in 1845.

After expressing his pleasure that Jackson was again well, Taney closed his letter with the remark that: "It is one of the most pleasing recollections of my life that I was near you in those trying times through which you so triumphantly passed."[23]

During the next summer, Taney remained at home, and he and his family continued well, "despite continued and oppressive heat." Commander Elliott of the Navy sent him an alabaster bust of Jackson made at Naples, and, naturally, "not an exact likeness." The bust was framed in wood from Mount Olivet and from the figure-head of the frigate "Constitution," and Taney wrote Jackson concerning it, on September 12, 1838. He rejoiced in Benton's reëlection to the Senate and "should almost have despaired of the Republic," if such a man "had not been sustained by the people of an agricultural State." In large commercial cities, Taney yet feared the "money power" as "irresistible," winning not only by "open corruption," but also by indirect influence; for, when men have families to support and know that "they will be employed and enriched by those who have the power to distribute wealth," they will obey the wishes of the wealthy, rather than "struggle with every difficulty." Men "are apt to persuade themselves that the path with the fewest difficulties is the best," and to "surrender the lasting blessings of freedom and manly independence, for temporary pecuniary advantages." The men of Taney's day can not help preaching and delivering orations, even to their most intimate friends, and the letter continued: "They forget the grinding oppression that awaits them from the power they are contributing to establish." He

[23] The regrets that he could not come to Tennessee were reiterated by Taney in his next letter, sent from Baltimore on September 12, 1838.

really believed in the truth of these over-emphatic statements, and thought the prospect a gloomy one, since the attempt to "destroy the spirit of freedom" would have excited indignation ten years ago, but no longer did so. He hoped that the "honest of all parties" would, before long, rise "to frown upon it and put it down." If the laboring classes become "servile and corrupt," the classes which made them such will be the first to suffer.

Grundy's appointment to succeed Butler[24] as Attorney General, pleased Taney. He sincerely regretted to part from Butler, who had remained in office reluctantly for a year, but would have chosen no other successor than Grundy. He was also pleased with the appointment of Mr. Justice Catron, because of "the strength of his judgment, legal knowledge, and high integrity of his character. He is a most valuable acquisition to the Bench of the Supreme Court."[25]

On January 10, 1839, from Baltimore, Taney next wrote Jackson, being about to go to Washington to open the term of Court. He hoped to come to the Hermitage in the next summer, and regretted to learn of the death of Colonel Earle. Benton's "noble and manly speech" in Jackson's defence, pleased him. He referred again to the "passage of the distribution bill," as "hailed with general exaltation by the opposition press," which were its "first victims." The administration measures would have prevented disaster, had they not been counteracted "by the extraordinary infatuation which seems to have governed the commercial world." Taney never gave up his faith in the correctness of Jackson's financial measures.

[24] Felix Grundy succeeded Benjamin F. Butler as Attorney General in 1838.

[25] The letter concluded with a sending of regards by Alice Taney to Mary Donelson. So did the letter of August 31, 1839.

In April, 1839, Taney was invited to be present[26] at New York on the celebration of the fiftieth anniversary of the inauguration of Washington as President, but the session of the Circuit Court prevented him from attendance. Later in the spring, he fell ill, and Mrs. Taney was also in "delicate health," so that he remained at home throughout the summer, "exercising almost daily by short rides on horseback," by which course he recovered his health. He was, therefore, again prevented from visiting Jackon, to whom he wrote on August 31, to express his regret. He sent congratulations upon the result of the Tennessee elections, having not felt so much pleasure over any State election since the New York one of 1834, which decided the fate of the "panic party." The recent result was another proof "that the agricultural portion of the Union may be misled for a time," but will soon discover their error and do justice to their faithful public servants. From the nature of their pursuits, they are more "independent of the money power than the people of the commercial cities." Jackson's "enemies regarded their former victory" in Tennessee "as a personal triumph over you," as Taney wrote, "in your own State."

Taney knew little of "election prospects in Maryland, and rarely" saw "any of the active politicians." In Baltimore City, the "friends of the administration" were "sanguine." The majority in the House of Representatives may depend on the Maryland delegation and, "when such a stake is to be played for, the opposition will put every engine in motion, and money from every quarter, if necessary, will find its way to Baltimore to control the election."

[26] Tyler, p. 350.

Duane, "anxious to escape from the utter nothingness into which he has fallen," had published the narrative of his incumbency of the Secretaryship of the Treasury, and had sent Taney a copy, in the hope, probably, that "one of us, or some of our friends, would be absurd enough to give it consequence by answering it. He seems never to have had elevation of character enough to understand his position as a member of the cabinet." This rather startling statement, Taney sought to justify, by claiming that Duane wrote down notes of conversations with Jackon, so as to injure him. It was a "new thing for a man to publish to the world that, while holding the confidential relation of a cabinet minister, ... he was performing the part of a spy," so as to furnish Jackson's enemies with weapons." The statements of such conversations, on the evidence of such a man, Taney held not worthy of much credit. His own conversation with Duane was referred to by the latter, in a "manner calculated to deceive."[27] Benton's late speeches, on the other hand, are lauded. His services had been great to Jackson and also to Taney, when "I was daily assailed in the Senate." Duane's book was "such a mass of vanity, folly and malignity, and put together in such confusion that it requires some time," in Taney's opinion, to "find out what he is after and expose his duplicity." Taney wished to know whether Jackson's "recollection agreed with his.

In his letter of November 7, he again congratulated Jackson on the Tennessee election. "The great Regulator[28] too has fallen, and we have lived to see every-

[27] Comments on Duane's book were sent by Taney on November 7, uncopied through lack of time. I have not found them. Taney had just returned from holding court in Delaware.

[28] The Great Regulator is probably Clay.

thing we said and did, verified and justified." In his exultation, Taney proceeded: "What would have happened, if the United States money had continued in the vaults of the United States Bank! whose conduct" had "been the cause of all the convulsions in the country since its charter." In his hostility toward such an institution, Taney wrote that a Bank of the United States will always cause such convulsions, "periodically, to favor the speculations of a few individuals and their friends who get possession of it."

Taney enclosed a Maryland election ticket of the Democratic party, bearing the emblem of a hickory tree, and Jackson's name as a watchword, in similar guise to the emblems born on the tickets of that party in Maryland, until the abolition of emblems on ballots in 1901.

From the Hermitage on October 10, 1839, Jackson answered Taney's letter. His own health was better from taking the "Matchless Sanative," a patent medicine. He regretted that Taney had not as yet visited him, but still hoped for such a visit, and would have much gratification in a few hours personal conversation with Taney. The Tennessee legislature now had a "decided Democratic majority in both Branches" and "the conduct of Duane, as exposed in his Book, "which contained so many positive falsehoods," had destroyed him in the estimation of all honorable men"—at least in that of Andrew Jackson.

In the Spring of 1840, Mrs. Taney fell through a trap door in a store, and broke her thigh, so that Taney was again disappointed in his hopes to visit the Hermitage. She suffered greatly, and the splints were not taken off until the latter part of August. While she was still confined to her room and could not go down stairs, nor

bear much weight upon her leg, Taney wrote Jackson, on September 4, 1840. He had left Baltimore in the past season only to hold court in Delaware.

He criticised Clay's speech at Nashville, a town from which it would have been in "better taste" for him "to stay away."[29] Clay's attack on the memory of Edward Livingston, than whom a "kinder, or more amiable man never lived," was "harsh and cruel," Livingston's financial troubles in New York came, not because he used public money for private purposes, but because he was a "victim of kind feelings toward another who abused his confidence." At any rate, he paid his debts, before he was nominated as Secretary of State.[30]

There should be a "vindication" of Jackson, by "our friends at Washington," but Taney thought it would be unwise for Kendall to publish Jackson's life yet, since it would "be treated as a party publication." Such a "work is for posterity" and should await a "calmer occasion," when the "great body" of the American people of "all parties will be ready to acknowledge how well you have deserved the gratitude of your country, from your civil as well as your military services." The "friends of administration" hoped to carry Maryland, which State was always doubtful.

Recurring to the currency, Taney wished the "Washington friends had felt more strongly the necessity of constant exertion on the part of the government to restore the circulation of gold and silver and to counteract the efforts of those who are striving to prolong the present state of the currency." Salaried officials at Washington had been permitted to "sell specie drafts

[29] Clay attacked Jackson's nominations to office as "improper and injurious to the public interest," yet Taney thought that he voted to confirm them.

[30] Edward Livingston (1764–1836) had removed to Louisiana in 1804 because of financial troubles experienced in New York.

given them for their salaries for depreciated paper, thus throwing it on the community, in return for specie collected for taxes." The government also furnished specie in large amounts for export. These practices were wrong, in Taney's mind, and should no longer be allowed. If clerks could not sell specie drafts, their money would be "paid out in small sums to the people" and these amounts "would have gone far to restore confidence, not only in the District of Columbia, but also in the surrounding country, and would have done much toward driving out of circulation the miserable and fraudulent shinplasters with which the country is overrun." Taney was apprehensive that the "advocates of paper are incessantly on their watch struggling against the introduction of specie," and that, unless the "officers of government are equally vigilant," the "paper party will triumph."

In November, Harrison, the Whig candidate for the Presidency, was elected, and in the following April, a month after Taney had administered to him the oath of office as President, he died, and Tyler, the Vice President, succeeded him. Taney was in Baltimore when Harrison died, and the news was at once sent him.[31] Mr. Carroll, the Clerk of the Supreme Court on April 5, wrote Taney, at the instance of Daniel Webster, the Secretary of State, to ask him to be present at the funeral, and to "see and confer with" the Cabinet "at this most interesting moment." Taney felt that the request was not made in a manner which comported with the dignity of his august tribunal, and, on the 6th, replied that: "I do not suppose I could, with propriety, come to Washington, unless I am requested to

[31] Tyler, p. 295.

do so by the Cabinet, or by the Vice President, when he arrives. It is certainly my sincere wish, as well as my duty, to pay every respect to the memory of the President, and to render every service in my power, in the new and painful condition of public affairs." Taney did not feel that there was "any disrespect" in omitting to give him a "direct invitation from the Cabinet;" yet, without such invitation, he was unwilling to come to Washington. He also felt that he should not state whether his opinion was that Tyler ought to take a new oath of office, unless "the communication" from the Executive Department to the judicial one were "direct and from the proper organ." Taney was not sanguine as to Tyler's attitude, and, on April 24, 1841, he wrote Jackson that he was surprised to find that many Jacksonians "entertained strong hopes that the elevation of Tyler to the Executive Chair would bring back the government to the principles upon which you administered it. For Mr. Tyler left you, upon the ground that you were not States Rights enough, and at that time, he was understood to go to the verge of nullification." Did he not say it was a "fanciful notion" that a "citizen owes *allegiance* to the State, but nothing more than *obedience* to the general government?" Taney thought it "curious that ultra States Rights men should have united with ultras on the other side." As Tyler has been associated and brought to power by the latter, how can he "be expected to thwart their plans of government?" Tyler had been "very prompt in distributing the spoils to the victors, and that was not exactly according to Virginia doctrine."

Taney believed that the press was so much under the influence of Biddle, who was never long out of his mind, that it was not pleasant for newspapers to write

concerning the "startling disclosures" which had been made as to the Bank of the United States, and therefore little appeared on that subject. The revelation of the "operations of the exchange committee of the Bank," afforded "proof of the soundness of the principles upon which we determined to remove the deposites." The Senate Committee, of which Tyler was chairman at that time, in its report, made in December, 1834, "justified and, indeed, praised very highly this Executive Committee, and reprehended me very sharply for my report to the contrary." Tyler's report had scarcely been distributed, before the Exchange Committee "began to prey upon the money of the Bank without stint and without limit." The report had satisfied Biddle that there was no danger to him of interruption, and he proceeded to use the Bank's money, "as if it had been his own."

Taney feared that another Bank would now be "saddled on the country." "Separated as I am from all political movements," he told Jackson, "I yet feel, when I am writing to you, as if we were again together at Washington." He hoped to meet Jackson in "another and better world," if not in this life. The hopes of the visit to the Hermitage were fading away, for Taney had "become, of late, so liable to sudden and severe attacks upon my lungs that I can hardly expect again to have health enough to justify me in venturing upon the journey to visit you."

Writing on September 30, 1841, Taney told Jackson that Tyler "Most agreeably disappointed me." He "possesses the utmost firmness, as well as high political integrity. . . . . I am not personally acquainted with him" and "did him injustice," having had "no confidence in him, because of his report" of 1834, when

Tyler was "deceived." "Advantage was taken of his want of acquaintance with the mysteries of banking, and, in the heat of a party contest and at the head of a party committee, he too readily gave year (sic) to men who wanted his name to sanction their dishonest proceedings." Taney rejoiced that he had lived long enough to see the people "rapidly recovering from the delusions under which they were recently laboring, and ready again to do justice to those who have defended and maintained their true interests."

The Chief Justice could never get far from one subject in these letters, and he now exclaimed: "What a scene of iniquity has been disclosed by the fall of that Bank!" This iniquity would have been concealed by a recharter and had its existence been "extended for 20 or 30 years and, with additional means, one can hardly imagine the ruin which would have followed its fall!" The "honest and industrious" will soon, "with one voice, acknowledge how much they owe to "Jackson's "courage and firmness and foresight." His "old friends" in Maryland were "in spirits" and hoped for "success in a hard struggle" to elect a Governor[32] and an House of Delegates. "Our State is small and full of corporations—some of them gigantic ones—and they have flooded the State with irredeemable paper, some of it greatly depreciated, and becoming worse and worse every day."

Taney's "own health" was "delicate," and although, as he wrote, "when I take care of myself, I get along very comfortably, yet I find that I cannot bear much exposure." Eight months later, on May 22, 1842, Taney wrote again deploring his "own infirm health,

[32] Jackson's "old friend," Francis Thomas, was the Democratic candidate for Governor and was elected.

which has prevented me from seeing you once more." He "can't stand so long a journey" as to Tennessee "in the heats of summer," and at other times, is engaged in Court, to hold which he expected to go to Delaware on the morrow.

Jackson answered the letter of September 30, 1841,[33] on November 27. He speaks of his own ill health, rejoices over the favorable result of the autumn elections, was much pleased with Tyler's course in the Presidency, showed great bitterness toward his opponents, and now despaired of ever having the pleasure of conversing with Taney, because of the latter's "arduous duties and the care necessary to preserve his health and useful life."

Jackson's ill health, his disappointment at failing to meet Taney again, and his hope to have that meeting "in a happier clime" are the themes of his letter of June 15, 1842, the last one found, which was an answer to Taney's letter of May 22.[34]

Although "withdrawn from political movements," the Maryland election of 1842 gave Taney "no small pleasure," as he wrote Jackson on October 24, rejoicing to see the "delusions of '40" pass away. He was even happier over the results in Pennsylvania and Ohio, because they were more important, and because, in Ohio, "the miserable and disgraceful buffoonery of coonskins and hard cider was again revived" by Clay. After these elections, there was no longer any danger of a new "great National Bank" to "govern the country by corruption and to enrich its favorites, at the expense of the industrious and unsuspecting classes of society." Tyler was "entitled to high praise for the firmness

[33] 4 Md. Hist. Mag. 311.
[34] 4 Md. Hist. Mag. 313.

with which he had resisted the violent efforts to force" a Bank upon the people. Yet Taney wondered that Tyler could not see that the "source of evil lies deeper" in a "paper currency." A "National Bank is nothing more or less than the worst possible form in which a paper currency can be established." Taney believed that "the paper money scheme of President Tyler is nearly as bad as a bank," but the bill embodying it can be repealed at any time. If the government issue paper money, it will soon become an "instrument of corruption and injustice and involve the country again in all the madness of speculation. . . . . The idea of paper, always convertible into gold and silver, is a mere fallacy." No government would incur the "expense of issuing paper, and paying clerks to keep an account of it," if it was not possible to "have more paper out than they had specie on hand." Paper was not of "superior convenience," to Taney's mind, and "no traveller ever felt himself discomforted by 10 or a dozen half eagles in his pocket." Larger sums could be supplied by "bills, founded on the ordinary operations of commerce, between distant places." The plan adopted by Jackson, when the "deposites were removed," was the only safe one—"to prohibit the circulation of small notes."[35] Jackson, by his "courage and foresight, laid the foundations" of the necessary reform, "under the most trying circumstances, by overthrowing the gigantic corporation that would perpetuate the evil.[36]

[35] Taney again wrote that he formerly thought that a $20 note might be issued, but now he put the limit at $50, of course making the alteration gradually.

[36] Taney again enclosed an election ticket, as a proof of the appreciation of Jackson by the people, and stated that his family have been ill, but are now well.

Writing on April 28, 1843, Taney stated that he was pleased to learn of Jackson's popularity in Louisiana. "Whatever[37] the corrupt influences of the Bank and paper money might accomplish in other places, by continually misrepresenting you, ... it has always seemed to me impossible that they could have kept alive so rancorous an opposition" to Jackson "in a city and State which owed so much to him," because of his victory at New Orleans over the British in 1814.[38]

Although he had been several years on the Bench of the Circuit in which Virginia was included, Taney did not hold court in Richmond until May, 1843, at which time[39] he was elected an honorary member of the Quoit Club at Buchanan's Spring, of which club Chief Justice Marshall had been a frequenter. Taney's health "gave way a good deal" about that time, so that he had to spend part of the summer at a sulphur spring, near Winchester, Virginia. In the autumn, he was better, and wrote Jackson on October 14, anew regretting that he could not come to Tennessee.

Retired, as he wrote that he had been, "from any active concern in political affairs since I have been on the Bench," he was surprised that the elections in Maryland went "against us." For months past, however, "our prominent men" had been "beating down rivals in their own ranks" and the result was "the destruction of the party." Remembering Jackson's "unshaken confidence in the virtue and intelligence of the people," Taney trusted the future might be better,[40]

[37] Jackson and Kendall asked Taney to prepare notes on his cabinet experiences for the latter's life of the former, and Taney promised to do so.

[38] Francis Scott Key had died, and Mrs. Taney had suffered so much from her brother's death as to "impair her health seriously."

[39] Tyler, p. 325. On his return—vide letter to Jackson of Jan. 4, 1844, he visited the Norfolk Navy Yard and saw the frigate Constitution.

[40] He remembered "many acts of kindness and friendship" from Jackson.

but could not avoid the foreboding that another Bank may come, since "paper money and its necessary consequences, i.e., speculation and the desire of growing rich suddenly without labor, have made fearful inroads upon the patriotism and public spirit of what are called the higher classes of society."

On January 4, 1844, he sent New Year's wishes to Jackson, and expressed pleasure that the fall elections were better. "Our friends" seem to "feel the necessity of healing their divisions . . . . to meet the common enemy."[41]

After Polk was elected to the Presidency, Taney wrote Jackson, on November 20, 1844, to congratulate him, and hopefully said: "the spirit of '28 and '32 was again abroad in this election, and has signally triumphed and the country will now have peace for many years. For the dangerous and evil influences," which united for Clay, will not do so for another. He would administer the oath of office to Polk with pleasure, and thanked God that Jackson had "lived to witness this great triumph."

On January 1, 1845, from Washington, Taney sent his last letter to his former chief, to "Wish you, according to our good old Maryland custom, a happy New Year, and many returns of it. The day never passes without my thinking of you and your many kindnesses to me."[42] Since he had been on the bench, Taney had "abstained from taking part in political movements, but the sincere

[41] He hoped that the Democratic Presidential Convention in the spring would be unanimous, and referred to the "most unjustly imposed" fine on Jackson by Judge Hall, as a surprising proof of "how far party spirit blinds men." He also deplored Dr. Linn's death.

[42] Jackson was even more than usual in Taney's thoughts on that day, for he had gone to the "Presidential Mansion" and had just received a call from Major Lewis, who showed him in confidence a letter from Jackson which rejoiced Taney.

regard I entertain for Mr. Polk and the trying times through which he and I passed together, made it more difficult for me to remain quiet, when he and Mr. Clay were opposing candidates." Taney had hoped that Calhoun would retire from the Cabinet, at the end of Tyler's term of office; but, as Jackson always said of Calhoun, "with all his talents, he had no judgment." If he "does not retire, Polk's first act, in asking him to do so, will require firmness, or his administration will be a failure. None of his cabinet officers should be a candidate for the Presidency. If Calhoun be retained, the Administration, in less than 12 months, will find itself in a minority of its own party." Taney thought that the rest of the cabinet might continue in office and he would retain at least Wilkins, Mason and Wickliffe,[43] who possessed "great ability." Polk was a "statesman," but could not carry on "the government successfully," unless he followed Jackson's example, heard everything and then decided for himself. Jackson was not destined to even one more year of life, for he died on June 8, 1845.[44] Taney was invited to attend memorial services held in New York, and replied, declining the invitation, and giving this estimate of the dead man:

The whole civilized world[45] already knows how bountifully he was endowed by Providence with those high gifts which qualified

[43] These members of the Cabinet were William Wilkins of Pennsylvania, John Y. Mason of Virginia and Charles A. Wickliffe of Kentucky.

[44] An unaddressed letter, written by Taney (Mss. N. Y. Public Library) dated August 27, 1845, at Jordan's Springs, states that he cannot order an "original paper," out of the keeping of the Supreme Court, but that the Court alone can issue such an order.

[45] Parton's Life of Jackson, III, p. 680. When Jackson died, Taney presided at a meeting in Baltimore on Nov. 9, 1845, at which it was resolved to erect a monument to Jackson in Baltimore and Taney was chosen president of the association. The plan was unsuccessful.

him to lead, both as a soldier and a statesman. But only those who were around him in times of anxious deliberation, when great and mighty interests were at stake and who were with him also in the retired scenes of domestic life, in the midst of his family and friends, can fully appreciate his innate love of justice, his hatred of oppression in every shape it would assume, his magnanimity, his entire freedom from any feeling of personal hostility to his political opponents and his constant and unswerving kindness and gentleness to his friends.

CHAPTER XI

The Period of the "Genesee Chief" (1846–1856)

In 1847, the Supreme Court decided the so-called License Cases,[1] ably argued by Webster, Rufus Choate, John Davis and John P. Hale. The decision was a curious one, for the judges could not agree upon the reasoning and seven of the nine justices filed opinions. The Court was unanimous to the effect that a State can constitutionally regulate, or prohibit the sale of wines or spirits which the Federal law has authorized to be imported from other countries. To put the matter in another aspect,[2] a majority of the justices held that the Congressional power in this matter was not exclusive.[3] Taney seized the true distinction in his opinion, when he maintained that, if the Statutes had obstructed the importation of the liquor, or had prevented its sale in the original cask in the importer's hands, they would have conflicted with the Congressional power; but the laws did not so conflict, because they were intended to act upon the liquor, after it had passed the line of foreign commerce and had become a part of the general property of the State.[4]

The law of Congress is the supreme law and "must prevail over the law of the State in conflict with it."

[1] 5 Howard, 504, Thurlow v. Mass., Fletcher v. R. I., Pierce v. N. H.

[2] In his opinion in the Passenger Cases.

[3] The New Hampshire case had slightly different facts, as we shall see, but all the cases involved prohibition laws of the New England States.

[4] Tyler, p. 297. The original package decision, Leisy v. Hardin, 135 U. S. 100, overruled the case of Pierce v. New Hampshire. Mickell, "Great Am. Lawyers," IV, 131, praises Taney's opinion, which is "so carefully thought out, and is so charming in exposition that it irresistibly compels the mind to its conclusions."

Beyond the limits of the Federal Constitution, the States retain their power over trade and commerce and each State "may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well being of its citizens." The difficulty lies in the application of these principles. "How far may a State regulate, or prohibit, the sale of ardent spirits, the importation of which from foreign countries has been authorized by Congress?" Taney, like many another judge, found it "no easy task to mark out by certain and definite line, the division between foreign and domestic commerce, and to fix the precise point in relation to every important article, where the paramount power of Congress terminates and that of the State begins." The Constitution did not draw that line, so it was necessary for judicial decision to be made thereupon. The first case upon this subject was Brown v. Maryland, in which it was virtually decided that, when the original package was broken up, the State law attached to the goods. Taney then made the following confession:

> I argued the case in behalf of the State and endeavored to maintain that the law of Maryland, which required the importer, as well as other dealers, to take out a license, before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional and, certainly, I at that time, persuaded myself that I was right and thought the decision of the Court restricted the powers of the State, more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one; and perhaps the best that could have been adopted, for preserving the right of the United States, on the one hand, and of the States, on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind.

Taney did not see how the line could be "drawn more accurately, and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution." While goods remain in the hands of the importer, they may be considered as *in transitu* and, consequently, a state tax on them would be "hardly more justifiable than a transit duty upon the merchandise, when passing through a State." "A tax in any shape upon imports," Taney continued, "is a tax on the consumer, by enhancing the price," and a State must not raise a revenue "for the support of its own government, from citizens of other States," either by a duty on imports, or indirectly. Otherwise, a State could "defeat one of the principal objects of forming and adopting the Constitution." A tax on the property of the importer is very different from a tax upon the thing imported.

Liquor is not to be kept out of the community as pestilence or pauperism should be; for these are not subjects of commerce, "not things to be regulated and trafficked in, but to be prevented." "Spirits and distilled liquors are universally admitted to be subjects of ownership and property and are, therefore, subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists." Congress, consequently, has the power to "admit or not, as it shall seem best, the importation of ardent spirits," and no State may prohibit their introduction. The laws of Massachusetts and Rhode Island, however, "act altogether upon the retail or domestic traffic within their respective borders," and act on the article, "after it has become a part of the general mass of the property in the state."

Though a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorized to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary, or advisable, to guard the health, or morals of its citizens, although such a law may discourage importation, or diminish the profits, of the importer, or lessen the revenue of the general government. And if any State deems the retail traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.

The New Hampshire case was based on a different principle from the other two. The plaintiffs bought a barrel of gin in Boston, brought it to Dover and sold it in the cask in which it had been imported, without the license of the Selectmen of the town, as required by the State law. The case differed from Brown v. Maryland, in that it arose out of commerce between two States, as to a matter in regard to which Congress had not exercised its power. The article had not passed beyond the limits of interstate commerce and the regulation acted upon it, "while it is within the admitted jurisdiction of the general government and subject to its control and regulation." The question, then, was whether a State might make regulations of such commerce, which do not come into conflict with the laws of Congress, or whether the grant to Congress was "of itself a prohibition to the States," rendering their laws on the subject void. To Taney, it appeared "to be very clear that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject of the State. . . . . The

State may . . . . for the safety, or convenience, of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors and for its own territory and such regulations are valid, unless they come in conflict with a law of Congress." There is no prohibition to the making of such regulations by the States, in the language of the grant to Congress, nor can such prohibition be inferred, by comparing the provision on this subject with those that relate to other powers granted; for, in many instances, after a grant to the United States, the Constitution proceeds to prohibit the exercise of the same power by the States. If it was "intended to prohibit the States from making any regulations of commerce, it is difficult to account for the omission" of a prohibition.

"If the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the Federal Government supreme upon this subject over the States, then the omission of any prohibition is accounted for and is consistent with the whole instrument." If the mere grant of the power over commerce to the United States was in itself a prohibition to the States, there would be no necessity of providing for the supremacy of Congress, as all State laws would be *ipso facto* void and there could be no conflicting legislation. "Only where both can legislate on the subject" can the question arise. Furthermore, the practice of the Federal government, in regard to pilotage laws, had conformed, in Taney's view, to this theory.

Pilotage is a subject, "admitted on all hands to belong to foreign commerce," and subject, therefore, to the

regulations of Congress, yet it is "continually regulated by the maritime States, as fully and entirely, since the adoption of the constitution, as before." The only law of Congress was passed as late as 1837 and was intended only to modify one provision of the New York law. The Federal act of 1789, providing that pilotage should continue to be regulated by the laws of the States, then in force or hereafter passed by them until Congress should make some other provision, would not have been constitutional, if the grant to Congress had involved a prohibition to the States, yet the validity of the law had never been questioned.

So also health and quarantine regulations are, necessarily, in some degree regulations of foreign commerce, yet they are upheld as valid. Taney considered that the proper construction of the whole decision in the case of Gibons v. Ogden supported his view. The police powers "are nothing more nor less than the powers of government, inherent in every sovereignty to the extent of its dominions." "By virtue of this power of sovereignty, a State legislates," and "its authority to make regulations of commerce is as absolute as its power to pass health laws," except in so far as it has been restricted by the Constitution of the United States.

In this view of the matter, the objects and motive of the State are of no importance, for the question is one of power. If States cannot make regulations of foreign commerce, such regulations are void, whatever may be their real object, and no Congressional action is needed to control them. Gibbons v. Ogden said that such regulations could be made by a State, subject to such control.[5] Consequently the grant to "the Federal government is not an absolute and entire prohibition

[5] Gibbons v. Ogden, 9 Wheaton 1.

to the States; but merely confers upon Congress the superior and controlling power.[6] Congress had made no regulation here, so New Hampshire might lawfully regulate the traffic in liquor, "as soon as it is landed in its territory."[7]

The relation of States to the Nation was also considered by Taney at this term, in the case of Cook v. Curtis.[8] He stated that he had tried the case in the Court below and had rendered such a decision as that from which appeal had been taken; because, "sitting as an inferior tribunal," he felt bound by the prior decisions of the Supreme Court, though he could "not assent to the correctness of the reasoning" on which they were founded. Now, his opinion was that the judgment in the Circuit Court ought to be affirmed, according to the decisions heretofore given, because the majority of the justices had determined not to consider the question as to the operation of State insolvent laws, an open one. "But in my opinion," Taney continued, "these decisions are not in harmony with some of the principles adopted and sanctioned by this Court and, therefore, ought not to be followed." Ogden v. Saunders[9] was wrong in saying that there was a collision

[6] Taney also appealed to Marshall's opinion in Wilson v. Blackbird Marsh Co., 2 Peters, 245.

[7] Taney uses this interesting sentence as to the construction of opinions: "In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. This is more especially necessary, in cases depending upon the construction of the Constitution of the United States, where, from the great public interests which must always be involved in such questions, the Court have usually deemed it advisable to state, very much at large, the principles and reasoning, upon which their judgment was made, by the counsel on either side in the argument." Biddle, Const. Hist., p. 165, speaks of Taney's opinion as a "calm, just, and (in my opinion), convincing presentation of the entire subject."

[8] 5 Howard 295.

[9] Ogden v. Saunders, 12 Wheaton 213.

between the United States and a State, when the latter passes beyond its own limits and the rights of its citizens and acts on the citizens of other States. How can the State laws "pass beyond" the State's limits except by comity? and, within those limits, Taney maintained, they should be binding on the Federal Courts, as well on those of the State itself.[10]

The question as to whether damages were due the Bank of the United States from the protest of the bill of exchange on France was decided in favor of the United States at this term. Taney withdrew from the bench during the argument, because he had given an opinion upon the matter, while he was Attorney General, but stated that the concurred with the Court's opinion.[11]

In Sheppard v. Wilson[12] Taney and the Court refrained from pronouncing an opinion, until Congress had the opportunity to pass an act to supply the omission of previous legislation as to appeals from territorial courts, and, in Rowan v. Runnells[13] he refused to reverse a decision of a Federal Court declaring a contract valid, though, subsequently, the highest Court of the State, where the contract was made and was to be performed, decided a similar contract[14] to be invalid, because it was prohibited by the State Constitution. He remarked that, "undoubtedly, this Court will always feel itself bound to respect the decisions of the State Courts and, from the time they are made, will regard them as con-

[10] The court's decision was that the insolvent law of Maryland could not discharge a man from a New York debt. Taney refers to Story's "Conflict of Laws," in which volume decisions are "collected together, and arranged, and commented on, with the usual learning and ability of that distinguished jurist."

[11] Catron wrote it. Wayne and McLean dissented. U. S. v. Bank of U. S., 5 Howard 393.

[12] 5 Howard 210.

[13] 5 Howard 134.

[14] One for the sale of slaves.

clusive, in all cases, upon the construction of their own Constitution and laws. But we ought not to give to them a retroactive effect, or the provision which secures to a citizen of one State a right to sue those of another might become utterly useless."[15]

In Cook v. Moffatt, he filed a concurring opinion as to the interpretation of the bankruptcy clause of the Constitution, stating that it was dangerous to infer a power in the United States government merely from the general powers of the government and the grant to it of judicial power.[16]

In the next term, Taney delivered no important opinions[17] but, at the term covering the winter of

[15] Minor decisions at this term were: (1) procedure on writs of Error, Pepper v. Dunlap, 5 Howard 51; Barry v. Mercein, 5 Howard 117; Mayberry v. Thompson, 5 Howard 121; Miner's Bank v. U. S., 5 Howard 213; (2) procedure in Appeal, U. S. v. Briggs, 5 Howard 208; (3) Pleading (Corporation may refer cause to arbitrators), Alexandria Canal Co. v. Swann, 5 Howard 83; (4) Protested bill, Hildeburn v. Turner, 5 Howard 69; (5) Patent (too vague composition), Wood v. Underhill 5 Howard 1.

[16] Cook v. Moffat, 5 Howard 295, 1847. Insolvent laws, Tyler, 285. Biddle, Const. Hist., 164, calls Taney's views "obviously correct."

[17] Minor opinions are upon procedure. (1) writ of error, Van Ness v. Van Ness, 6 Howard 62; and Nesmith v. Sheldon, 6 Howard 41; (2) Villalobos v. U. S., 6 Howard 81 (land claims in Florida); (3) De Armas's Heirs v. U. S., 6 Howard, 103 (Spanish land title in Florida); (4) U. S. v. Curey, 6 Howard, 106 (procedure in Appeal); (5) Perkins v. Fonwright, 6 Howard, 206 (Final decree); (6) Forgav v. Conrad, 6 Howard 201 (Defendants in Equity case whose interests are separate may appeal separately; (7) Bank of Metropolis v. N. E. Bank, 6 Howard 212 (Explains 1 Howard 234); (8) Bein v. Heath, 6 Howard 228 (Dissents, no opinion. Husband suing for wife in equity); (9) Planter's Bank v. Sharp, 6 Howard 301 (Dissents, no opinion. Obligation in law of contract prohibiting a bank from transferring by endorsement any note); (10) Hogg v. Emerson, 6 Howard, 437 (Patent, dissents, no opinion); (11) Houston v. City Bank of New Orleans, 6 Howard 486 (Bankrupt act); (12) U. S. v. Yates, 6 Howard 605 (Dismissal of case and appearance of counsel); (13) N. J. Steam Nav. Co. v. Merchant's Bank of Boston, 6 Howard 344 (Concurs with majority. Express between New York and Providence); (14) Sims v. Hundley, 6 Howard 1, (Groves v. Slaughter to be followed—notes given in payment for slaves—Rules of evidence prescribed by State law to be

1848-1849, we find one of the most important decisions from his hand.[18] On the face of the action, it was simply one for breaking and entering a house; but the whole question of the so-called Dorr rebellion in Rhode Island against the old Colonial Charter was involved. Martin Luther sued Luther M. Borden, who justified himself on the ground that large bodies of men assembled in different parts of the State for the purpose of overthrowing the government by military force and were levying war on the State. The State had been declared under martial law, in consequence of this, by the Governor under the charter. Luther was one of the insurrectionists, whom Dorr had arrested, and Borden was a military officer, who, in obedience to the command of his superior officer, broke into Luther's house to search for and arrest him. Luther replied to Borden's justification that he was guilty of trespass of his own proper wrong. Taney approached this important issue with caution. The Constitution of the United States, "as far as it has provided for an emergency of this kind and has authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature and placed the power in the hands of that department" of the government. "A republican form of government" had been guaranteed to each State. Under this guarantee

> It rests with Congress to decide what government is the established one in a State. For, as the United States guarantees to each State a republican government, Congress must necessarily decide

followed by United States Circuit Courts sitting in these States); (15) Gwin v. Yerger, 6 Howard 7 (A state law providing for summary process against a Sheriff for the recovery of money levied by him, may be adopted by a Circuit Court, as to its marshal, but not as to his sureties).

[18] Luther v. Borden, 7 Howard 1, Tyler 301.

what government is established in the State, before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government, under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

The dispute occurred in Rhode Island in 1842 and did not last long enough to bring the question to an issue then, but "the right to decide is placed" in Congress and "not in the Courts." It rested with Congress to determine upon the means proper to be adopted to quell domestic violence and so to fulfil this guarantee. Congress might, if they had deemed it most advisable to do so, have placed it in the power of a Court to decide when the contingency had happened, which required the Federal government to interfere; but Congress had[19] vested "the power of deciding whether the exigency had arisen, upon which the government of the United States is bound to interfere," in the President. An "armed conflict" is clearly a case of "domestic violence" and "one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the Act of Congress." The Court may not inquire during nor after the insurrection as to whether the President's decision is right. The President, on the application of the Governor claiming under the charter, recognized him as the executive power of the State and was ready to call out the militia. A knowledge of this decision

[19] By the Act of February 28, 1795.

put an end to the armed opposition and was "as effectual, as if the militia had been assembled under his orders." Taney continued:

It is said that this power in the President is dangerous to liberty and may be abused. All power may be abused, if placed in unworthy hands. But it would be difficult, we think, to point out any other hands, in which this power would be more safe and, at the same time, equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities are unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel, when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power, as human precedence and foresight could well provide.

Taney recognized that "the President, in exercising this power," might "fall into error, or invade the rights of the people of the State" "and believed that it would then be in the power of Congress, to apply the proper remedy. But the courts must administer the law, as they find it."

The high power has been conferred upon this Court, of passing judgment upon the acts of the State sovereignties and of the legislative and executive branches of the Federal government and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action and to take care not to involve itself in discussions which properly belong to other forums. No one, we

believe, has ever doubted the proposition that, according to the institutions of the country, the sovereignty in every State resides in the people of the State and that they may alter and change their form of government at their own pleasure. But, whether they have changed it or not, by abolishing an old government and establishing a new one in its place, is a question to be settled by the political power.

And when that power has decided, "the courts are bound to take notice of its decision and to follow it."

In the days of reconstruction of the seceded States of the South, the question involved in this case gave rise to the dispute between the Presidential plan of reconstruction, advocated by Presidents Lincoln and Johnson and the Congressional plan of reconstruction, as embodied in the Davis-Wade bill and in the measures promoted by Charles Sumner and Thaddeus Stevens. The Supreme Court did not pass upon the subject, in its fullness, at the time,[20] but in a recent decision has firmly placed itself on the ground of Taney's decision in Luther v. Borden and has said that it is a legislative duty to determine the political questions involved in deciding whether a State government republican in form exists.[21]

At this term, also were decided that group of actions commonly known as the Passenger Cases.[22] The Court was sadly divided.[23]

[20] See Texas v. White. 7 Wall 780.

[21] Kernan v. City of Portland, 223 U. S. Reports, 118 at 151. See Steiner's Life of Henry Winter Davis, p. 286.

[22] Tyler, p. 299. Smith v. Turner, etc., 7 Howard 283. Taney's dissent extends from 464 to 494. Mickell, as usual, takes an enthusiastically favorable view of the opinion, and ("4 Gt. Am. Lawyers," p. 139) speaks of it as "unsurpassed for closeness of reasoning and nicety of discrimination between the relative power of State and Federal Governments."

[23] A reviewer of Carson's "Supreme Court" in the Nation for April 7, 1892, at p. 269, speaks of "this lamentable, if not shameful, exhibition of judicial discord;" but he is an unfriendly critic, for he characterizes this whole period

The States of New York and Massachusetts had passed laws, requiring a master of a vessel engaged in foreign commerce to pay a certain sum to a State officer for each passenger brought in from a foreign country and the Court's decision was to the effect that the law was inoperative, because it conflicted with the Constitution.

Taney dissented from this judgment. His view is far narrower than that of later legal opinion and shows that he had not yet outgrown his strict construction of the commerce clause, gained when he was counsel in Brown v. Maryland. He thought no argument was needed to "show that the power over the intercourse of persons passing from one State to another is not with Congress" and, if Congress had not that power, neither had it the power over passengers from foreign countries. Federal power over intercourse with foreign countries was, exclusively, with their governments and public authorities, and had no connection with private persons. The State law met the vessel after she had arrived in the harbor and within the territorial limits of the State; but while the passengers were still afloat, in navigable water. The Statute of Massachusetts was a part of the pauper laws of the State and the payments were placed in a fund to support alien paupers. The payment was "the condition, upon which the State permits the alien passengers to come on shore and mingle with its citizens and reside among them." The money was demanded of the Captain, for the sake of convenience, but the burden really fell on the passenger, who paid more for the voyage

as one, in which the judges were "struggling awkwardly" to reconcile the "new perceptions that the Constitutional canons of construction established before 1835 were vitally essential to the preservation of national authority" with "their earlier political training upon State's rights and strict construction"—a reconciliation surely not necessary for such a Federalist as Taney.

because of this tax. By no treaty or act, has Congress "required the States to receive and suffer to remain" within their borders every person, "whom it may be the pleasure of the United States to admit." It is a fundamental question, whether Congress may lawfully exercise such power, or whether the Court must treat any such act as an usurpation of power and, neither recognize, nor enforce it. The Court had decided[24] that a State may remove from among its citizens any persons it wishes. If so, it follows that it may refuse them entrance—it would be useless to admit them and then expel them forthwith. The power cannot, to Taney's mind, be a concurrent one; but must be exclusive—"paramount and absolute in the sovereignty which possesses it"—or "disorder and confusion" would result. The power must be discretionary, and the necessity of the law is not before the Court, though it would be easy to show from history that Massachusetts is wise in taking steps against pauper immigrants. If the State has the right to admit persons, the Court cannot supervise the placing "such securities and conditions," as the State saw fit, upon that admission. As Congress has passed no Act, does that silence, following the decision in the License Cases, mean that there may be free ingress of persons? This is not a regulation of vessels. Massachusetts asked a security from one class of aliens and took a sum of money from those less chargeable. Taney did not believe that "the overwhelming power" of deciding who should be permitted to reside in a State was vested in Congress. He could not keep slavery out of the discussion and pointed out that, under such a power, emancipated slaves from the West Indies might be granted the right to reside through-

[24] Groves v. Slaughter, 15 Peters 449; Prigg v. Pa., 16 Pet. 539

out the Southern States, in spite of any State law, thus inevitably producing the most serious discontent and, ultimately leading to the most painful consequences. The power to prohibit the foreign slave trade does not carry the power to force the State to admit any one, or the State would be subject, as to "its domestic concerns and social relations, to the power of the Federal government."

Passengers are not imports,[25] for that word covers only articles of property. The clauses in the Constitution granting Congress the powers to tax and to regulate commerce are distinct and separately placed. This levy is not a tax on the Captain, any more than import duties on merchandise in his vessel are. Taney feared that the regulation of commerce might be so used as to impair the taxing power of the State. The New York law was intended to pay for inspection, so as to prevent the introduction of contagious diseases into the State and, consequently, took on the same footing as quarantine laws. The Captain and the passengers were transferred from the jurisdiction of the General Government to that of the State upon the vessel's entry at the Custom House.

Taney concluded his opinion with a sentiment accepted by the Court in later decisions[26] that every citizen is entitled to free access, not only to the Federal departments at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. "We are all citizens of the United States and, as members of the same community, must have the right to pass and repass through every part of it, without interruption, as freely as in our own States." These are the words of a Federalist, not of a States rights man.

[25] Vide N. Y. v. Miln, 11 Peters 103.

[26] Crandall v. Nevada, 6 Wall 35

Taney delivered only two other opinions of moment at this term of Court.[27] He held that the Federal Courts have no jurisdiction in admiralty of a libel by owners of a vessel against a consignee of a cargo, to recover a contributory share due in general average on account of cargo, which the master had delivered to such consignee. Taney said:

It is much to be regretted that the jurisdiction of the Court of Admiralty in this country is not more clearly defined. It has been repeatedly decided in this Court that its jurisdiction is not restricted to the subjects over which the English courts of Admiralty exercised jurisdiction at the time our constitution was adopted. But this case is, in its principles, nothing more than the Common Law action for money had and received, brought in Admiralty.[28]

In a later most important decision[29] Taney was destined to do much towards the definition of the admiralty jurisdiction.

In the other opinion, from which four justices dissented,[30] the Court held that, in Louisiana, where the

[27] Minor opinions are: (1) Matheson v. Bank of Ala. (writ of error); (2) Townsend v. Jennison, 7 Howard 706 (Taney dissents from argument, agrees with conclusion); (3) Hardeman v. Harris, 7 Howard 726 (It is not a material exception to an answer to an equity bill, that it is silent concerning an immaterial fact, which, if admitted, could not tend to support the complainant's equity); (4) Udell v. Davidson, 7 Howard 769 (Defence founded on an allegation that the defendant's conduct was in fraud of an act of Congress is not matter which the Court can re-examine at his instance on a writ of error); (5) Neilson v. Lagow, 7 Howard 772 (jurisdiction); (6) Lewis v. Lewis, 7 Howard 776 (Statute of Limitations in Illinois); (7) Van Rensselaer v. Watt, 7 Howard 784 (Practice); (8) Nesmith v. Sheldon, 7 Howard 812. The Supreme Court of Michigan having settled a question as to the constitutionality of a law of that State, the Supreme Court follows that decision. See the Dred Scott Case. Rowan v. Runnels, 5 Howard 134 contra.

[28] Cutler v. Rae, 7 Howard 729 at 732.

[29] That of the Genesee Chief.

[30] U. S. v. Coxe, 7 Howard 833.

judge passes both upon questions of fact and upon those of law, if a jury trial is not claimed, the proper practice is for the judge to insert in the records the facts found by him. The Supreme Court, on a writ of error, must then treat such facts as conclusively settled and consider the law arising therefrom as stated in the case.[31]

With this year's work, half of Taney's judicial career concluded. Carson, after a careful study of the Supreme Court Reports, wrote that Taney most frequently was in agreement with Nelson and Campbell and that the association of these three justices had succeeded to the earlier one of Marshall, Washington and Story.[32] Woodbury and Daniel were, in the main, in accordance with Taney, but broke with him in the development of the admiralty jurisdiction. McLean and Wayne were the "high toned Federalists" on the Bench, as Curtis called them, and Catron, Grier, and McKinley had similar tendencies, but less pronounced. During this general period, a number of changes had taken place in the membership of the Court. Thompson had died in 1843 and had been succeeeded by Nelson. Woodbury succeeded Story in 1845 and was succeeded by Curtis in 1851. Grier succeeded Baldwin in 1844 and Campbell took McKinley's place in 1852.

At the December term of 1849, Taney was the author of several important opinions.[33] In Perrine v. Chesa-

[31] Agreement made in 1795 between the Spanish government and the Marquis de Maison Rouge, for the transportation of families into the Province, was held not to constitute a contract.

[32] Supreme Court.

[33] These are all contained in 9 Howard. The opinions in 8 Howard are not of great moment, viz: (1) U. S. v. Carr, 8 Howard 1 (The Act of 1793 does not cause the forfeiture of goods for the neglect of a master of a vessel to insert in the manifest a particular description of articles of foreign manufacture required by that act. If the master delivers to the collector a manifest, certified by the collector at the port of departure, and it actually contains mention of the goods,

peake and Delaware Canal Company[34] the Court held that a corporation can exercise no powers, save those expressly conferred upon it, or those which are incident to its existence and, therefore, a canal corporation, not empowered by its charter to exact tolls from passengers, may not exact such tolls from vessels, by reason of their carrying passengers. "A charter is to be fairly examined, and reasonably and justly expounded, and not to receive a strained interpretation; but, when thus examined, if its terms fairly admit of doubt as to whether any power burdensome to the public has been granted it," this power may not be exercised. In these sentences, we hear the voice of the author of the decision in the Charles River Bridge Case. The canal was originally planned to open the trade of the Chesapeake Bay to Philadelphia. Baltimore interests were, therefore, naturally adverse to the project; but they wished

though imperfectly described, there will be no forfeiture.); (2) U. S. v. Boisdores Heirs, 8 Howard 113(Land claims in Mississippi—expounding words of Statute); (3) Bennett v. Butterworth, 8 Howard 124 (Jurisdiction); (4) Veazie v. Williams, 8 Howard 134 (Fraudulent action. Dissents with two others, but without opinion); (5) Maxwell v. Kennedy, 8 Howard 210 (Defendant may take advantage by demurrer of laches appearing on the face of the bill. A judgment was rendered in South Carolina in 1797, and a bill was filed in Alabama in 1844, in a suit against the debtor's children); (6) Wanzer, v. Tupper, 8 Howard 234 (Bailey v. Dozier, 6 Howard 23, affirmed); (7) Lord v. Veazie, 8 Howard 251 (Court below heard a third person, not a party to the suit, upon a representation that the parties to the suit, having a common interest, had gotten up a feigned suit to procure an opinion of the court on questions affecting the petitioner, without making him a party. On writ of error, the lower court was sustained); (8) Wilson v. Barnum, 8 Howard 258 (Patent case-jurisdiction); (9) Gibson v Stevens, 8 Howard 384 (Ownership of warehouse certificates); (10) Mayer v. Grima, 8 Howard 490 (Louisiana law imposing a tax on legacies payable to aliens is not repugnant to United States Constitution); (11) Williamson v. Berry, 8 Howard 495 (Trust bequest in N. Y. Dissents with two others without opinion. Biddle Const. Hist., 185, says the dissent "must receive the approval of every constitutional lawyer."

[24] 9 Howard 172.

access to the Susquehanna River, which was encumbered with rocks. Pennsylvania agreed to remove these rocks, if Maryland would permit the canal to be made, but had a provision inserted in the Canal company's charter, that it should derive no other powers but those given it by Maryland, or necessarily incident to a corportation. Charters were obtained from Pennsylvania, Maryland, and Delaware. Taney stated that, if the corporation may refuse permission to vessels to pass through its canal, the line of intercourse may be interrupted and Pennsylvania lose her purpose. "Such an unlimited power to levy contributions on the public and one so inconsistent with the ordinary course of legislation upon that subject, and we may add so unjust and injurious to the public, ought not to be sustained in a court of justice, unless it is conferred in plain and express words."

"In Maryland[35] with its broad bay, its great numbers of navigable tidewater rivers, interrupting travel by land, its numerous villages and towns on their banks, and its commercial metropolis, seated at the head of the bay," there was much transportation of commerce on the water and many legislators had to pass to Annapolis by boat. The legislature acted with full knowledge of this usage. It is possible that, if steam navigation could have been foreseen, a toll on passengers might have been allowed; "but it is not the province of this Court to enlarge the powers of a corporation beyond the limitations of its charter, because circumstances have changed. Our province is to expound the law as it stands, not to determine whether larger powers would not have been given, if the legislature had anticipated events which have since happened." These questions

[35] Page 188.

are "emphatically questions between the rights of the public and the powers of the corporation." The opinion contains a clear and fine statement of the powers of the judiciary and the rights of corporations.

When the holder of a bill, in Lambert v. Ghiselin,[36] inquired of a person trading at a place, if he knew where the endorser resided, he was told, in reply, that he lived at Nottingham on West River, the place where the one answering traded. The holder had no better means of knowledge and the Court held that he had used due diligence to learn the place of abode and that a notice put into the post office and directed to the endorser at Nottingham was sufficient, nor was the holder required to give further notice, even though he should afterwards discover that the notice was wrongly sent, since the law does not require actual notice, but reasonable diligence only and reasonable efforts made in good faith, to give such notice.

In another case[37] the Court held that the delivery and title of certificates of money due at the Treasury of the United States, under the treaty between the United States and Mexico, were good, when these certificates bore indorsement in blank by the payee, and were acquired in good faith and for a valuable consideration by the defendant. Although these certificates were not on the same footing as negotiable paper by the law merchant, yet they were property, transferable by such endorsement and delivery.

A more important case, arising out of the Mexican war, concerned the capture and occupation of Tampico by the United States forces during the conflict. The

[36] 9 Howard 562. The only minor opinion in 9 Howard is Goodtitle v. Kibbe at p. 471 concerning a Spanish land grant in Alabama.

[37] Baldwin v. Ely, 9 Howard 580.

occupation was sufficient[38] to cause the place to be regarded by other nations as part of our territory, but that fact did not make it a part of the United States under the Constitution and laws. Under the revenue laws, Tampico remained a foreign country and goods sent thence to Philadelphia were subject to duty, although the "country was in the exclusive and firm possession of the United States." Taney's opinion continued thus:

> The genius and character of our institutions are peaceful and the power to declare war was not conferred on Congress for the purposes of aggression or aggrandizement; but to enable the general government to vindicate by arms; if it should become necessary, its own rights and the rights of its country. A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest, or the acquisition of territory, nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. . . . . This can be done only by the treaty making power, or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command and to employ them, in the manner he may deem most effectual, to harass, and conquer, and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.[39]

This discussion of international law in time of war is lucid and comprehensive. "By the laws and usages of nations, conquest is a valid title, while the victor

[38] Fleming v. Page, 9 Howard 603.

[39] Page 614.

maintains the exclusive possession of the conquered country. . . . . As regards all other nations," Tampico "was a part of the United States and belonged to them, as exclusively as the territory included in our established boundaries. But yet it was not a part of the Union. . . . . The inhabitants were still foes and enemies and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist." Even the custom house at Tampico was not "established to give the people of the State of Tamaulipas the benefits of commerce; but, as a measure of hostility, it was a mode of exacting contributions from the enemy." Every port is a foreign one, unless its custom house is within a collection district established by Congress and the officers granting clearance from the port exercise their functions under the authority of the laws of the United States. At the treaty of peace, Tampico was returned to Mexico, so that Taney thus sums up the matter:

> The sovereignty of the United States resides in the people of the several States and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities, to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed, nor exercised any rights or powers in relation to the territory in question, but the rights of war.

The case of the Kentucky minstrels—Strader v. Graham,[40] brought a slavery question before the Court, namely: whether slaves held in Kentucky were emanci-

[40] 10 Howard 82.

pated, by going over into Ohio with the permission of their master. Graham had sent three of his slaves across the Ohio River into the State of that name to play as musicians at entertainments. For two years, however, they had not left Kentucky, until one day they were received on board a steamboat, at Louisville, without their master's knowledge and were taken to Cincinnati, whence they escaped to Canada. Graham then brought suit against the owners of the steam boat, who averred that the negroes were freemen. The Kentucky court decided in favor of Graham, and upon an appeal the Supreme Court sustained the judgment, upon the ground that the question as to whether employment of slaves in a free State should free them upon their return home, was purely one of local law, over which the United States Court could not take jurisdiction.

The North West Ordinance of 1787 and its effect were considered in the opinion. That instrument could not restrict the power of the States within their territories; but Taney maintained that, in any case,[41] it had been settled that the Ordinance was no longer in force in Ohio, or in any other State, or these States would be placed in an inferior condition, as compared with States not within the territory covered by that Ordinance. Most of its material provisions had been established by law and, therefore, the Ordinance is often said to be in force. What was really the case was that the Ordinance "ceased to be in force, upon the adoption" of the Constitution, and the provisions which were in force were those taken from the Ordinance and enacted on August 7, 1789, by Congress. This decision disquieted

[41] Perundi v. First Municipality, 3 Howard 589.

the abolitionists, but seems not to have excited a great deal of notice.

About the same time, Taney voiced the Court's decision in refusing to grant an exemption from taxation to a railroad which had no such express privilege in its charter[42] and in a Patent Case[43] he stated that, if an article were known, or used, in a foreign country, but had not been previously patented, or described, in a printed publication, it may be patented in the United States. The patentee "would discover what is unknown and communicate the knowledge which the public had not the means of obtaining, without his invention."[44]

Later in the term, Taney spoke for the Court, in holding[45] that a neutral, having resided in an enemy's country, resumes his neutral character, as soon as he puts himself and his family *in itinere*, to return home to reside, and that he has a right to take with him the means of support of himself and his family in specie. Such property is not forfeited by a breach of blockade by the vessel, on board of which he has taken passage, if he, personally, is in no fault. The defendant, a Frenchman domiciled in Mexico, had sailed from Vera Cruz to Havana, taking his earnings with him, with the intent to return to France.[46]

[42] P. & W. R. R. Co. v. Md., 10 Howard 376. Consolidation of Balto. & Port Deposit Railroad with two others.

[43] Gayler v. Wilder, 10 Howard 477.

[44] Minor opinions are: (1) Wilson v. Sanford, 10 Howard 99 (Procedure under the patent act), (2) Rhodes v. Galveston Str., 10 Howard 144,(Procedure), (3) Sears v. Eastburn, 10 Howard 187 (Trespass in Ala. Practice), (4) Henderson v. Tennessee, 10 Howard 311 (Jurisdiction. Land Grants).

[45] U. S. v. Guillem, 11 Howard 47.

[46] Minor decisions in the volume are: (1) Grimes v. U. S., 11 Howard 163 (amount involved in an appeal), (2) Hortsman v. Henshaw 11 Howard, 177. (If the drawer of a bill puts it in circulation with forged endorsement upon it of the name of the payee and the drawee accepts it and pays the money to a bona

In Bennett v. Butterworth[47] Taney maintained that in Texas, a State where the distinction between law and equity does not exist, the United States Court sitting there may adopt the State procedure to try suits at law, but that equitable rights must be prosecuted and tried, according to the rules prescribed by the Supreme Court for pleadings and practice in equity. Here again, a slavery question appeared and the Court held that a verdict in a suit to try title to slaves, which merely found for the plaintiff, $1200, or the value of four negroes, would not warrant a judgment. The matter in issue was *negroes*, not their value.

We have now come to the year 1851 and to the great case of the *Genesee Chief*, which seems to me Taney's most important contribution to jurisprudence.[48] In England, only tidal rivers had been navigable; hence, in English Law, the Admiralty Courts, which had been given jurisdiction over navigable waters, found their jurisdiction limited to places which felt the effect of the tides of the sea. In the United States, the vast

fide holder for value, he cannot recover back the money paid, since his acceptance is a conclusive acknowledgment that he has funds of the drawer.) (3) Brooks v. Norris, 11 Howard 204. (Limitations Writ of Error.) (4) Hogan v. Ross 11 Howard 294 (Writ of error.) (5) Moore v. Brown, 11Howard 414 (Limitations on land title in Illinois. Dissents.) (6) Gill v. Oliver, 11 Howard 529. (Insolvency. Dissents in brief opinion, considering that the decision of the Maryland court from which appeal was taken should be reversed.) (7) Hogg v. Emerson, 11 Howard 587 (Patents, Dissents. No opinion.) (8), U. S. v. Ferner, 11 Howard 653 (Spanish laws prevailing in Louisiana before cession and affecting land titles therein must be judicially noticed by the Court. Their existence is not matter of fact for a jury.)

[47] 11 Howard 669.

[48] Propeller *Genesee Chief* v. Fitzhugh, 12 Howard 443. Emerson in his essay on Power in a volume entitled "Conduct of Life." (a volume which was copyrighted in 1860, but contained lectures delivered for several years previous) thus refers to this decision: "The commerce of rivers, the commerce of railroads, and who knows but the commerce of air balloons, must add an American extension to the pondhole of admiralty."

expanse of the Great Lakes and stretches of the continental rivers, extending for hundreds of miles, were not tidal; yet upon these waters large vessels could move, with burdens of passengers and cargo. The Supreme Court decided, and Taney expressed its opinion, that the admiralty jurisdiction of the United States Courts extends to waters which are actually navigable, without regard to the ebb and flow of ocean tides. It was an eminently reasonable decision. The rule of the English law was rejected, because the conditions here were such that it was inapplicable; *ratione cessante, res ipsa cessat*, as the old maxim has it. Yet it was a bold decision to be made by a precedent-loving court and it was one of great importance, since it placed the inland waterborne commerce of the whole country under the control of uniform Federal laws and of a uniform system of Federal courts. This was a great nationalizing decision and was worthy of Taney's Federalistic training. In a case concerning a collision, the constitutionality of an Act passed by Congress in 1843 was brought into question and the Court upheld the law, not as a regulation of commerce, but under the provision of the United States Constitution that the judicial power of the United States extends to admiralty and maritime jurisdiction. Taney was a great admiralty judge and his opinions in cases of collisions are always peculiarly satisfactory.

The collision occurred on Lake Ontario in May, 1847, and the propeller, *Genesee Chief*, struck and sank the schooner, *Cuba*, bound from Sandusky to Oswego. Taney stated that, if a steamer be wrongfully in dangerous proximity to a sailing vessel, and there is immediate and pressing danger of a collision and the master of the sailing vessel, previously in no fault, in the alarm of

the moment, fails to give a proper order, this did not exempt the steamer from damages for the ensuing collision. When a steamer had not a proper look-out in the night time, there is *prima facie* evidence that it was at fault in case of a collision.

The case derived its importance, however, not so much from the facts of the collision, as because the proceedings were instituted under a Congressional law which was brought into question and which could only be used in these circumstances, if the admiralty jurisdiction extended to the great freshwater lakes. Appreciating the importance of the results of the decision, Taney approached the subject with caution. Congress could not extend the admiralty jurisdiction under the power to regulate commerce, for the powers are distinct.

> These lakes, are, in truth, inland seas. Different States border on them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards which attend commerce on the ocean. Hostile fleets have been encountered on them and prizes have been made, and every reason, which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. . . . .
>
> It would be contrary to the first principles on which the Union was formed, to confine these rights to the States bordering upon the Atlantic and to their tidewater rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States.

Such a construction, certainly, was not the founders' intentions and to accept it, would fail to give "perfect equality in the rights and privileges of citizens, not only in laws but in ways of administering them; for the commerce on the lakes and the navigable waters of the West will be denied the same courts and the same jurisdiction

for its protection" as the Constitution secures for the Atlantic States.

The only objection was that these Western waters have no ocean tide; but there is "nothing in the ebb and flow that makes waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide" that makes them unfit for such jurisdiction. The distinction is absolutely arbitrary. In England, the definition is sound; for no stream is navigable beyond tidewater and so tidewater and navigable water are synonymous terms. At the time when the Constitution was adopted, the English definition was equally proper in America. "Until the discovery of steamboats, there could be nothing like commerce, upon waters with an unchanging current, resisting the upward passage." The old description of public navigable rivers was used after it had ceased, from the change in circumstances, to be a true description. The case of *The Thomas Jefferson*,[49] in which the old definition was approved, embarrassed the Court. But Taney hesitated not at all to break the rule of *stare decisis* and, boldly, said that: "if we follow it, we follow an erroneous decision, into which the Court fell when the great importance of the question, as it now presents itself, could not be foreseen, and the subject did not, therefore, receive that deliberate consideration which, at this time, would have been given to it."

That decision was made in 1825, when the "commerce on the rivers of the west and on the lakes was in its infancy and of little importance, and but little regarded, compared with that" of 1850.[50] If the tide limited

[49] 10 Wheaton 428.

[50] The case of *The Thomas Jefferson* was one which only involved questions of jurisdiction and not of property, so that no contracts were disturbed by disregarding it. The Court's opinion was rendered by Justice Story.

the admiralty jurisdiction, then a purely arbitrary line would have to be drawn on the Mississippi River.[51] "There can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and for trade. The lakes and the waters connecting them are undoubtedly public waters and we think are within the grant of admiralty and maritime jurisdiction."

Taney considered that the judiciary act of 1789 had this in view, in speaking, not of tidewater but of "waters which are navigable from the sea by vessels of 10 or more tons burden."

Tyler's eulogy[52] of this decision is deserved that "it is a remarkable instance of a thoroughly technical lawyer realising that enlightened jurisprudence requires the judge to adapt our borrowed law to the conditions of our own country" and that it is a "signal example of impartial judicial wisdom."[53]

Another important case decided by Taney in 1851 was Dinsman v. Wilkes[54] in which a marine brought

[51] Page 303.

[52] Curiously Taney's ardent eulogist, Mikell, 4 Great American Lawyers 144, almost alone here is critical and states that Taney had first "decided what ought to be the law and then had written his opinions to justify his conclusions." Biddle, Const. Hist., p. 174, speaks of Taney's reasoning in this case, as "set forth so clearly, so convincingly, may I not say in a manner incapable of being confuted."

[53] 12 Howard 39.

[54] Minor decisions in the volume are: (1) Smith v. Clark, 12 Howard 13 (practice) (2) Parks v. Turner, 12 Howard 39 (Statute of jeofailes and practice of Circuit Court for Louisiana) (3) Montault v. U. S., 12 Howard 47 (After February 10, 1763, the date of the treaty of Peace between Great Britain and France by which territory between the Mississippi and the Perdido Rivers was ceded to the former, France could not grant lands therein) (4) Grand Gulf R. R. Co. v. Marshall, 12 Howard 165 (Procedure in writ of error) (5) Bein v. Heath, 12 Howard, 168 (Injunction bond in Louisiana Equity procedure) (6) U. S.

suit for trespass against the commander of the United States exploring expedition because of punishment inflicted for refusing to do duty in a foreign port, on the ground that the time of his enlistment had expired and he was entitled to a discharge. The case was felt to be one of "much delicacy and importance as regards our naval service. For it is essential to its security and efficiency, that the authority and command confided to the officers, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States, would soon be dishonored on every sea. But, at the same time, it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service, to be oppressed, or injured by his commanding officer, from malice, or ill will, or the wantonness of power, without giving him redress in the courts of Justice." Wilkes was in distant seas and was charged with a high public duty. The plaintiff was really not entitled to a discharge, but the authority to determine the question for the time being lay in Wilkes's hands. He might err, but his decision was conclusive, and the plaintiff's duty was to submit. The belief of Dinsman as to his

v. Wilkinson, 12 Howard 246 (Procedure, a copy of a bond duly authenticated is admissible in evidence) (7) Bond v. Brown, 12 Howard 254 (Ruling of Judge without jury in Louisiana) (8) Saltmarsh v. Tuthill, 12 Howard 387 (Mandamus and supersedeas) (9) Lanton v. Stanton, 12 Howard 423 (Decision of State Court in favor of right claimed under an act of Congress does not entitle the loser to a writ of error) (10) U. S. v. Porche, 12 Howard 426 (Act of 1824 right to file a petition in Louisiana under a French or Spanish grant of land to two years thereafter) (11) U. S. v. LeBlanc, 12 Howard 435 (Paper extracted from Spanish register of land titles in Louisiana, purporting to contain only the recitals which usually precede Spanish titles in form, but adding no words of grant, is not evidence of title, especially when nothing had been claimed under it for 69 years).

rights furnished no justification for disobedience, consequently, for that "act of insubordination," he was "liable to punishment." Wilkes also had discretion as to the degree of punishment, but might not punish from malice, or vindictive feeling, or disposition to oppress, and his motive in inflicting the punishment was a question of fact for the jury exclusively.[55]

In the United States v. Reid[56] Taney gave the decision for the Court that the rules of evidence in force in the Federal Courts are not those of England, but those in force in the respective States, when the judiciary act of 1789 was passed. Congress may change these rules, but no subsequently passed State law may do so. In the same case, he refused to set aside a verdict, because two jurors read the newspapers in the jury room; for nothing in this act was calculated to influence the decision in the case and both of the jurors swore that it had not done so.

In the latter part of the year, Taney delivered opinions in two important cases arising out of the Mexican War. In one of these[57] an army officer was sued in trespass, for seizing, in Chihuahua, valuable property of a New York merchant, who was a Spaniard by birth, but who had been naturalized as a citizen of the United States. A verdict was given below for Harmony, the merchant, in a considerable amount[58] and Mitchell, the officer, then appealed from this judgment. The facts in the case were as follows: Harmony had planned a trading expedition from Santa Fe to Chihuahua, before the Mexican War began, and set out from Fort Independence,

[55] 12 Howard 361.

[56] Mitchell v. Harmony, 13 Howard 115.

[57] $90,806.14 and $5,048.94 costs.

[58] Jecker v. Montgomery, 13 Howard 498.

Missouri, on that intent. After General Kearney's campaign began against the Mexican forces in New Mexico, he stopped Harmony, but permitted him to continue trading behind the army. On Kearney's transfer to California the campaign was left to Colonel Doniphan, under whose command was Mitchell, the appellant. When Harmony had arrived in the State of Chihuahua, and was about 300 miles from the city of that name, he determined to proceed no further. Doniphan insisted that he do so and, therefore, Harmony continued "in that hazardous expedition." "This," said the Court, "was unquestionably a taking of the property, by force, from the possession and control of the plaintiff and a trespass on the part of the defendant, unless he can show legal grounds of justification." The latter may be shown thus:

> If with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false, or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment and took the property to promote the public service; he must show, by proof, the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it is so pressing as not to admit of delay, and the occasion such, according to the information upon which he acted, that private rights must, for the time, give way to the common and public good.

Mitchell had not shown this: "The property was seized, not to defend" Colonel Doniphan's "position, nor to place his troops in a safer one, or to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition upon which he was about to march. To justify the seizure, the

danger, or need, must have been urgent and immediate; not remote, or contingent. There was no question here of an officer's discretion in military operations, or in relation to those under his command." His distance from home and the duties in which he is engaged cannot enlarge his powers over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And, when the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own. "It is impossible to define the particular circumstances of danger, or necessity, under which the power may lawfully be exercised; for every case must depend on its own circumstances." "Our duty is to determine under what circumstances, private property may be taken from the owner by a military officer in time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy, which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." This insistence upon the subordination of the military power to the laws is the essence of Taney's later and more famous decision in Ex Parte Merryman.

Mitchell also attempted to justify himself on four other grounds. First, he claimed that Harmony was trading with the enemy. That plea had been correctly overruled by the Court below, since the military officer had no right to seize the property of an American citizen for performing an act which the constituted authorities, acting within the scope of their lawful powers, had authorized to be done. Secondly, Mitchell pleaded that the compulsion was necessary to prevent the property

from falling into the enemy's hands. His reply to this, Taney combined with that to the plea that the property had been taken for public use.

Thirdly, the defendant asserted that Harmony had resumed possession and control of the property before losing it, which fact released Mitchell from any claim for damages. Taney replied that this had not been proven. To the fourth ground of defence, that Mitchell had obeyed his commanding officer, the Court's rejoinder was that the evidence showed that Mitchell advised the order and volunteered to execute it and that the "order given was to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. . . . . The order may palliate, but it cannot justify."

The other case arising out of the Mexican war, dealt with naval affairs[59] and the Court held therein that neither the President, nor any inferior executive officer, could establish a prize court competent to take jurisdiction in a case of capture, *jure belli*.

The law of nations, confirmed by an act of Congress, made it the duty of a captor to send the captured property for adjudication by a prize court in his own country with competent jurisdiction. He may be excused, through imperative circumstances, for making a sale of the property and, afterwards in due season, subjecting the proceeds to the jurisdiction of the proper prize court. The orders of the commander-in-chief not to weaken the force by detaching an officer and crew for the prize, or the captor's own deliberate judgment that the public service does not permit him to make such a detachment, will excuse him from sending in the prize for adjudication. If no sufficient excuse is given,

[59] U. S. v. Ferriera, 13 Howard 40.

or if the captor unreasonably delayed to bring the prize to an adjudication, the court may refuse to proceed and award a restitution, with or without damages, on the ground of the forfeiture of rights by the captor, even though the original capture were lawful. If the captor neglect to proceed at all, the Court, on a libel filed by the owner for a marine trespass, may grant a monition to proceed to a adjudication in a prize court, or may at once award damages. In this case, however, the captor had not forfeited his rights and the prize court was ordered to proceed with the case. The United States Sloop of War, *Portsmouth*, seized the *Admittance*, an American vessel, trading with the Mexicans at San José, California. A prize court had been established by the commandant at Monterey, a chaplain having been appointed Alcalde there and authorized to exercise admiralty jurisdiction. This court had later been sanctioned by the President. On the ground that prize crews could not be spared from the squadron to bring the captured vessels to the United States, the ship and cargo were condemned at Monterey in 1847. The money, which was the proceeds of the sale, had been sent to the United States and was now in the custody of the Treasury department. The court thus summed up the matter: "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made and the validity of the seizure and the question of prize, or no prize, can be determined in his own courts only, upon whom he has conferred jurisdiction to try the question."

Still another case of some importance was one which arose from the operations of the American army in Florida.[60] An act of Congress authorized the District

[60] Not by the President. There is a note on p. 52 on Hayburn's Case and on the Yale Todd case.

Judge for that State to adjudicate claims arising from this source and decreed that the claims should then be paid, if the Secretary of the Treasury should, on receipt of the evidence, deem them equitable. Under these circumstances, the Supreme Court held that the Judge did not exercise judicial power, but acted only as a commissioner and no appeal lay. Congress was morally bound to provide a tribunal for such cases, but had failed to do so. The question at issue was one between American and Spanish Law. These *ex parte* proceedings were not judicial and the Secretary of the Treasury, not the judge, decided whether the United States owed a debt. Taney thought the act was a breach of the treaty with Spain, by which Florida had been annexed; but that the question was political and not judicial. Of course, the Judge, acting as commissioner and using "judgment and discretion," must exercise a judical power, as does every commissioner. The law had, for many years, been acted on as valid and constitutional and the Court would not now overturn it, especially as the validity of the appointment of the judge as commissioner by the act[61] was not before the Court.[62]

[61] Minor decisions in 13 Howard were: (1) Crawford v. Points, 13 Howard 11 (No appeal allowed from District Court decree in bankruptcy) (2) Roe v. Beebe, 13 Howard, 25 (Ejectment in Alabama) (3) Barrow v. Hill, 13 Howard 54 (Procedure on Writ of Error) (4) Williamson v. Barret, 13 Howard 101 (Collision, Dissents, no opinion) (5) Morsell v. Hall, 13 Howard 212 (Demurrer) (6) U. S. v. McCullogh, 13 Howard 216 (Land grant in Louisiana) (7) Trumbull v. Adams 13 Howard 295 (Under warehousing act of 1846, an importer had no right, independently of regulations by the Secretary of the Treasury, as soon as the law had been passed, to land goods at a point of delivery to which the goods were destined and store them there, giving bonds as the act directed, since the operation of the act was confined to ports of entry, until extended by the Secretary to points of delivery) (8) Lawrence v. Caswell, 13 Howard 488 (Under tariff act of 1846, only the quantity of brandy imported, and not that shown by the invoice, is dutiable: but as this act lays an ad valorem duty, an allowance of 2 per cent of the quantity gauged cannot be made under the act

One of Taney's most important dissenting opinions was filed at this term and the general opinion, even of his admirers, pronounces him to have been wrong in it, owing to his too narrow construction of the power over commerce. It was the famous Wheeling bridge case,[63] in which the Court held that a law of Virginia, authorizing the obstruction of the Ohio River, by the construction of a bridge over the stream, was inoperative, because the river was a public navigable stream and the bridge obstructed free navigation. Pennsylvania brought the suit, inasmuch as that State, being the proprietor of public works, suffered special damages to its property by reason of this alleged public nuisance. The Court ordered that, by a suitable drawbridge, navigation should be restored to the condition of being free from an unreasonable obstruction, but that the bridge should not be ordered to be abated as a nuisance.

Taney said that, if the bridge was a nuisance, it was because of the violation of some law which the court had the right to administer. Pennsylvania had the same rights as an individual and no more. The Federal Government, in Taney's view, had the right to regulate commerce on the Ohio River, as a public navigable stream; but had not exercised that power, consequently, the Court can not act under any Statute. Nor can it act under the Common Law: for the United States Courts have no Common Law jurisdiction, unless it has been conferred by Congressional action. The bridge

of 1799, for that law applied only to liquors subject to duty by the gallon) (9) United States v. Pellerin, 13 Howard p. 9. (French grants in Louisiana after the date of the treaty making the cession to the United States are void, unless a continued possession has laid the foundation for presuming confirmation of a Spanish grant by the authorities.)

[62] Pa. v. Wheeling Bridge Co., 13 Howard 518 at 579.

[63] Gibbons & Ogden, 9 Wheat 1.

was not a nuisance under the Common Law of Virginia. If it had been such, the persons, who built and continued to operate the bridge, might have been indicted thereunder, but this could not be done. Congress may declare the obstruction of navigable streams an offence against the United States; but, until this has been done, Taney saw no redress for Pennsylvania. He distinguished cases of this kind from boundary cases, where the original jurisdiction was conferred by the Constitution and where the power of Congress was merely to provide for the procedure. The bridge lay exclusively within the territory of Virginia and Taney held that the authority of that State remained over the river, until Congress shall act, as otherwise the river would be under no control. He could find no reason for deciding against the bridge in the compact betweeen Virginia and Kentucky, when the later area became a State, nor in the act regulating coasting vessels. He distinguished the case from Gibbons v. Ogden,[64] likened it to Wilson v. Blackbird Creek Marsh Company,[65] and called attention to the fact that, if the bridge obstructed navigation, the Virginians also suffered. He held that the fact that there was a port of entry on the Ohio above the bridge was of no moment. Equity should not interfere in this case, as Taney viewed it, for the evidence was conflicting and the injury doubtful and there were no serious embarrassments in the way of an action at law by Pennsylvania for damages. That State suffered a "speculative, questionable, and, at most, inconsiderable loss." She may not sue in behalf of individuals. The bridge will promote the convenience of the public and the advantages which the great body of the people of

[64] Wilson v. Blackbird Creek Marsh Co. 2 Pet. 245.

[65] 14 Howard 38.

the United States will reap from the bridge appeared to Taney to outweigh the disadvantages and inconvenience sustained by commerce and navigation. Taney thought the case "came to near the confines of legislation" and it is fairly clear now that the Court was right in holding that he pushed the doctrine of the silence of Congress to a dangerous excess.

In 1852, Taney was the mouthpiece of the Court in Kennett v. Chambers,[66] a case of some importance, in which his opinion seemed to Biddle "eminently wise and correct."[67] The case involved a contract made in 1836 by an inhabitant of Texas, to convey land there to citizens of the United States, in consideration of advances of money made by them in the State of Ohio, to enable him to raise men and purchase firearms, to carry on war with Mexico. The independence of Texas had not yet been acknowledged by the United States, so that the contract was held by the Court to have been contrary to our national obligations to Mexico: to have violated the public policy and the neutrality laws of the United States; and, consequently, to have been one which can not be specifically enforced by the Federal Courts. It

[66] Constitutional History 176 (a), p. 50.

[67] Minor decisions at this term were: (1) Wylie v. Cox, 14 Howard 1 (Appeal) (2) Ex parte Taylor, 14 Howard 3 (Mandamus) (3) Kanouse v. Martin, 14 Howard 23 (procedure on Writ of Error) (4) Ex parte Many, 14 Howard 24 (Mandamus) (5) Exparte Many, 14 Howard 25 (Reargument permitted, only when member of Court who concurred in the judgment asks it) (6) Herman v. Phalen 14 Howard, 79 (Affirmance) (7) Perkins v. Fouringuet, 14 Howard 328 (appeal) (8) Peale v. Phipps, 14 Howard 358 (Receiver appointed by a State Court in Mississippi cannot be served in that capacity in a Federal Court in Louisiana) (9) Bosley v. Bosley's Executrix, 14 Howard 391 (A contract made by a testator after making his will, to lease land for 99 years, with a ground rent extinguishable by the payment of a fixed sum, revokes a devise. Whether the land passes with the residuary estate is a question of fact) (10) Jackson v. Hale, 14 Howard 525 (Receipt of Warehouseman) (11) Bloomer v. McQueen, 15 Howard 539 (patent).

belonged to the Federal Government to decide when Texas was no longer a part of Mexico. Taney went on to say[68] with great wisdom:

The intercourse of this country with foreign nations and its policy in regard to them are placed, by the Constitution of the United States, in the hands of the government and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation, against which the war making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order, or peaceful relations between the citizens of different countries, without it. It is, however, more emphatically true, in relation to the citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it and is himself, personally, bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation, that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government, upon which he himself has agreed to refer the power. It is his own personal compact, as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote, or encourage, revolt, or hostilities against the territory of a country with which our government is pledged by the treaty to be at peace, without a breach of the faith pledged to the foreign nation. If he breaks these rules, the Court will not aid him, even though he

[68] 14 Howard 268. Another dissenting opinion was filed in Re Kaine, 14 Howard 103 where Taney maintained that, when a United States Marshal, under order of a commissioner, held a man for extradition as a fugitive from justice in Great Britain, the Court below, to which a habeas corpus writ had been served out, had erred in upholding the commissioner's proceedings.

was actuated by a desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved, if the judicial branch of the government countenanced and sustained contracts made in violation of the known and established policy of the political department, acting within the limits of its constitutional power.

The question of the independence of Texas was entirely for the department of the government charged with foreign relations to determine. Taney would not investigate whether Texas was independent before our recognition of her as a State; for, to do so, would "take upon ourselves the exercise of political authority, for which a judicial tribunal is entirely unfit and which the Constitution has conferred exclusively upon another department." The subsequent acknowledgment and annexation of Texas gave no legality to the agreement, which was void and illegal when made. The contract was to be performed in Cincinnati, not Texas, and the advance of money for purposes in "contravention of the neutral obligations and policy of the United States" avoided the contract. No law of Texas could absolve an United States citizen from his duty to his government, nor compel the Federal Court to support a contract, if made either in violation of our laws, or in contravention of the public policy of the government, or in conflict with subsisting treaties with a foreign nation. There is a wise sanity about this opinion which is very effective.[69]

[69] 15 Howard 62. Minor opinions in the same volume of reports: (1) U. S. v. Roselius, 15 Howard 36 (Spanish land title in Louisiana) (2) Phelps v. Meyers, 15 Howard 160 (procedure) (3) Winans v. Denmead, 15 Howard 330 (Taney dissents in patent case. No opinion.) See Connor's Campbell, p. 25. (4) Walworth v. Kneeland, 15 Howard 348 (Jurisdiction) (5) Carter v. Bennett) 15 Howard 354 (Jurisdiction through diverse citizenship) (6) Dem. v. Ass. of the Jersey Co., 15 Howard 426 (Confirmation of Martin v. Waddell).

In the case of Vincennes University v. Indiana, Taney dissented.[70] The University had been created by the Territory of Indiana in 1806, and the Court held that the legislature had this power and that the State Constitution had not impaired the corporation's rights. While the franchises could not be exercised while there was no board of trustees, yet the corporation was not dissolved and its powers to act were restored by a subsequent law, under which the board was organized. The corporation was not a public one and the legislature could not divest its title to land given it by the charter and confer it upon another body politic. Taney, dissenting, distinguished between a reservation of lands from sale in 1806 and a grant of land. The former did not, to his mind, divest the title from the United States. The funds of the institution, he said, were contributed wholly for public purposes by the people and the appellants had no private individual interest, but are merely public agents for a public purpose. We listen here to echoes of the Charles River Bridge Case.

The great patent case of O'Reilly v. Morse, involving the electric telegraph, was Taney's most important opinion in 1853.[71] The Court upheld the claim of S. F. B. Morse to be the first inventor of the magnetic telegraph. If he had been preceded by an European invention, neither patented nor described in print, his patent would still be good, nor would inquiries made, or information, or advice received by him from men of

[70] The fact that the American patent was not made for the same time as a foreign patent for the same invention did not make it invalid.

[71] The specifications for a patent must be so "full and exact that anyone skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes." The patent given confers "the exclusive right to use the means he specifies to produce the result, or effect he describes, and nothing more."

science, impair his claim to an invention actually made by him. Morse had petitioned for a patent in 1837, received a patent in 1840, and obtained reissues in 1846 and 1848, the latter one being quite important.[72]

The case was recognized as important, was argued at the term before that at which the decision was made, and was then continued. Taney said of Prof. Joseph Henry, one of the witnesses in the Court below: "no one has contributed more to enlarge the knowledge of electro-magnetism and to lay the foundations of the great invention of which we are speaking."

Morse began work on the invention at a time, when "the conviction was general among men of science everywhere that the object could and, sooner or later, would be accomplished." Four inventors were nearly simultaneous in their discoveries, Morse in America, Steinheil of Munich in 1838, Wheatstone in 1837 and Davy in 1838 in England, but the two latter ones did not describe their invention until 1839. Morse made his invention in 1837, overcoming the difficulty of the gradual weakening of the galvanic current on the wire, so that after a certain distance, it was not strong enough to produce a mechanical effect. The variations from his earlier descriptions in the reissue did not imply that there had been a different discovery, but rather that the inventor gave a "more perfect description of his invention." His claim for the "use of the motive power of the electric, or galvanic current, ... however developed, for marking or permitting intelligible characters, signs or letters, at any distances, being a new application of that power of which I claim to be the first inventor" was too broad: for he described but one process and there should have been a disclaimer filed.

[72] Ohio Co. v. De Bolt, 16 Howard 416.

As there was delay in this, Morse was not given costs against the infringer; but the law, which required the disclaimer, was remedial, not penal; and was for the protection both of patentee and of the public, so the patent was not overturned.[73]

Another decision made later in the term[74] showed a divided Court, which did not agree upon principles, only Justice Grier concurring with Taney. The case involved the right of a State to tax a corporation previously untaxed and the prohibition of the impairment by a State of the obligation of a contract entered into the case. In Taney's long opinion he said:[75]

> It cannot be maintained, in any tribunal in this country, that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than those fixed by the Constitution of the United States, upon the ground that they may make contracts ruinous to themselves. The principle, that they are the best judges of what is for their own interest, is the foundation of our political institutions.

Banks may be exempted by contract, from their equal share of the taxes, as they are likely to be a benefit, and even if they later prove to be a public injury, the contract is binding, if it be within the authority of the

[73] At p. 429.

[74] Minor decisions in this volume are: (1) Burgess v. Gray, 16 Howard 48 (State Courts have no jurisdiction to try to give effect to inchoate French or Spanish titles to land. Mere possession of land in Missouri is no title against a grantee under the United States.) (2) Fournequet v. Perkins, 16 Howard 82 (Exceptions to a master's report) (3) Siozer v. Many, 16 Howard 98 (Taxing costs) (4) Robertson v. Smith, 16 Howard 106 (jurisdiction under Section 25 of the Act of 1789 as to powers of trustees of bank (5) State bank of Ohio v. Knoop, 16 Howard 392 (Taney held that Ohio Life Insurance Co. Case should have been followed.

[75] 16 Howard 635, Doe, v. Braden.

State. The Charles River Bridge Case admitted this fact, but decided against the corporation, because the privilege had not been so granted.

> The powers of sovereignty, confided to the legislative body of a State, are undoubtedly a trust committed to them, to be executed, to the best of their judgment, for the public good, and no one legislature can, by its own act, disarm their successors of any of the powers, or rights, of sovereignty, confided by the people to the legislative body, unless they are authorized to do so by the Constitution under which they were elected.

The Ohio Constitution, interpreted by an Ohio Court, decided that the Constitution did not make this authorization; but earlier decisions, made while the State Constitution of 1802 was in force, are contrary to this. "This Court always follows the decision of the State Courts in the construction of their own Constitution and laws. But where those decisions are in conflict, this Court must determine between them" and "adopt the construction" the Constitution "received from the State authorities, at the time the contract was made." If the contract was then valid, its validity cannot, subsequently, be impaired by the legislature. This question, as we shall see, came up subsequently in the Dred Scott case.[76]

In one of the many perplexing suits arising out of Spanish grants of lands in Florida,[77] Taney held that whether the King of Spain had power to annul a previous grant, by a provision of the Treaty of 1819, is a "question foreclosed in every judicial tribunal of the United States, by the action of the President and Senate,

[76] 17 Howard 369 at 391.

[77] The Statute of Elizabeth conferred no new powers on the crown and so was not in point.

treating with him as having that power." He added that "a treaty is, therefore, a law made by the proper authority."

At the term beginning in December 1854, Taney concurred with the decision, but dissented from the reasoning in Fontain v. Ravenel,[78] concerning charitable bequests in Pennsylvania and South Carolina. The Court held that its judicial power extended to law and equity, but not to the prerogatve powers, which the king, as *parens patriae*, exercised over infants, lunatics, idiots, and charities. These powers remain with the States, whose laws may not authorize the Federal Courts to exercise power that is not in its nature judicial, nor can they confer upon them prerogative powers.[79] The Circuit Courts of the United States deal with bequests for charitable purposes, as they deal with those for other lawful purposes.

At the same term, a boundary case between Florida and Georgia was determined, Taney giving the opinion, while four justices dissented.[80] He held that the United States, as proprietor and grantor of the lands in the disputed territory, may bring evidence to establish the boundary claimed by the United States. The omission of any regulation made by Congress under the power to exercise jurisdiction between States, did not, the Court repeated, deprive the Supreme Court of jurisdiction. The general rule and usage of courts was adopted. The Court further said that the United States need not be made a party, even though it has an interest; but that the Federal Attorney General, in his official capac-

[78] McLean, Curtis, Campbell and Daniel.

[79] 17 Howard 477.

[80] Fremont v. U. S., 17 Howard 542. 17 Howard 232 at 258. The matter had previously come before the Court in 11 & 12 Howard.

ity, could not conduct a suit for a State.[81] In a case involving land titles in California[82] the Court had for consideration the title to a grant of 10 square leagues made by the Mexican Government for meritorious services, which land had later been surveyed under the laws of the United States, since Indian troubles had made it dangerous to survey the land under Mexican rule. Alvarado, the grantor, sold the tract to General Frémont, whose title to it was confirmed.

The distribution of the estate of Robert Oliver of Baltimore caused Taney to dissent from the Court's findings in Williams v. Gibbes.[83] The effect of a Maryland decree in Chancery, as to the distribution of a common fund, to one not guilty of laches, nor party to the decree, was to be determined. Taney had differed from the Court in its previous decision, but conformed to the decision and dismissed the case, when it came back to him at the Circuit Court. "It appears, however, by the opinion just delivered," Taney wrote, "that I was mistaken and placed an erroneous construction on the opinions formerly delivered," consequently, he gave the reasons for his acts and, with proud dignity, thus

[81] Page 270.

[82] Minor decisions at this term are: (1) Bruce v. U. S., 17 Howard 437 (Accounts and bond of an Indian agent) (2) Poydras v. Treas'r of La., 17 Howard 1 (A Citation to a State on a writ of error against a judgment won by the Treasurer, the State not being a party on the record, should be sent him and not the Governor or Attorney General) (3) Shields v. Thomas, 17 Howard 3 (the amount needed to give the Court jurisdiction, is the total sum due and if it be over $2,000.00 jurisdiction attaches, though the share of each complainant is less than that amount) (4) Barrebean v. Brant, 17 Howard 43 (Abatement) (5) Bank of Tenn. v. Horn, 17 Howard 157 (Lien in La. on lands of debtors) (6) Peck v. Sanderson, 17 Howard 178 (Collision of vessels) (7) U. S. v. Seaman, 17 Howard 225 (Mandamus refused to compel Superintendent of public printing to place a document in the hands of the printer of the Senate, rather than in those of the printer of the House.)

[83] 18 Howard 477.

closed his opinion:[84] "With all the habitual respect which I feel for the judgment of my brethren, the opinion I held at the time remains unchanged."[85]

The opinions rendered by Taney at the December term of 1855 are unimportant. In United States v. Booth[86] Taney held that, when the Clerk of a State Supreme Court neglects, or refuses, to make a return to a writ of error, the Court will lay a rule on him to show cause why the return should not be made. Taney concurred with the final decision in the Wheeling Bridge Case.[87]

These were the halcyon days of Taney's life. Van Santvoord, wrote at this time in the "Lives of the Chief Justices:"[88] "At the head of the procession" of the justices in their black silk gowns at the opening of court, "you observe a tall, thin man, slightly bent with the weight of years, of pale complexion and features somewhat attenuated and careworn, but lighted up by that benignant expression, which is indicative at once of a gentle temper and a kindly heart. With a firm and

[84] 21 Howard 506.

[85] 18 Howard 420 at 462. Minor opinions at this term are: (1) Greeley's Administration v. Burgess, 18 Howard, 413. (Taney dissented from the view that was not necessary to set forth specifically the reasons on which a charge against appraisers of goods was made). (2) Maxwell v. Newbold, 18 Howard 511. (Jurisdiction. Question must actually have arisen in a State Court, and the clause of the Constitution and the law involved must be certified to the Court that what was claimed may be seen and whether it was denied). (3) Stairs v. Peaslee, 18 Howard, 521. (Appraisal of value of cutch imported. A product of India shipped from Halifax to Boston, is to be appraised at its value in London and Liverpool, its chief markets. The term "country" embraces all the possessions of the State.) (4) Hudgins v. Kemp, 18 Howard, 530. (Appeal Bonds).

[86] 1st ed. 1854 p. 522–525, 2nd ed. revised by Wm. N. Scott, appeared in 1882:

[87] Tyler, p. 469.

[88] Tyler, p. 320.

steady step," he moves to his seat and turns to the audience piercing eyes "beneath the dark mass of hair which overhangs the forehead of the tall, thin, venerable, old man."

He disliked personal differences, and used his good offices in 1848 to harmonize the Reporter and the Clerk of the Court, when they had fallen out with each other,[89] writing Mr. Peters, the Reporter, "I will see, when we meet again, if there is not a place left for the peacemaker—for a peacemaker who sincerely respects and and esteems both of you; and who would do much to reestablish friendly relations between you."

In the next year, General Zachary Taylor wrote Taney,[90] requesting that he administer the presidential oath; not only in compliance with custom, but also to "give expression to the high respect I entertain for the Supreme Bench and its august presiding officer." Taney, with equal courtesy, replied, expressing his pleasure at performing the ceremony and finding the duty "more agreeable, because the high trust to which you are called has been spontaneously bestowed by the American people upon a citizen already so eminently distinguished for the able and faithful discharge of great public duties."

His former adversaries had become friendly. Webster in an address at the Pilgrims' Festival in New York in 1850,[91] said that we are Protestants, but a Roman Catholic is Chief Justice and no man imagines that the "administration of public justice is less respectable or less secure."[92] Clay had long since buried his hostility.

[89] Quoted in 67 Catholic World 396.

[90] Tyler, p. 317.

[91] Tyler, p. 318.

[92] On October 27, 1851, he was present at the laying of the corner stone of the House of Refuge in Baltimore, Scharf's Chronicles of Baltimore.

William H. Seward asked the privilege, in January 1851, of inscribing to Taney a speech recently delivered on the French spoliation claims, both because he believed that Taney would approve of its sentiments[93] and "because it would be an expression of the high regard which, in common with the whole American people, I entertain for you, as head of the Judiciary Department." Taney declined the request, as he was "very unwilling to have" his "name in any way connected with a measure pending before the Legislative or Executive Departments of the Government," lest his so doing "might be construed into interference."[94]

Judge Taney's youthfulness of spirit, and his approachability by young people, are shown most pleasingly in a letter now in the collections of the collections of the Maryland Historical Society, written by him to Mr. J. B. Noel Wyatt, on March 17, 1852, when Mr. Wyatt was four years old, and Judge Taney was 75. Mr. Wyatt's mother had sent the Judge a bottle of old Madeira wine, on the occasion of Taney's birthday, in the name of her son, as the two families were, at that time, in very close and intimate friendship. In reply, Judge Taney wrote:

My dear Jimmie

I thank you for your Birthday present, and shall drink a glass of it today to your health. And when you become seventy five years old, as I am today, you will know how pleasant it is to be remembered on your Birthday by a young friend—the representative of much matured older ones: some living, some dead.

You will, I am sure, prove yourself worthy of them. And that you may always do so, is the sincere prayer of your friend,

R. B. Taney.

Mr. J. Bosley Wyatt.

[93] Letters and Times of the Tylers by L. G. Tyler I 497.

[94] Tyler, p. 322.

In 1855, at the Maryland Institute in Baltimore, Ex-president Tyler[95] said that he had voted in the United States Senate against Taney as Secretary of the Treasury; but "had I known him, as I have since in his exalted office of Chief Justice of the United States, maugre any discrepancy of opinion which might have existed between us, there was no office, however exalted, either in the gift of the Executive or the people, for which I would not promptly have sustained him."

Samuel Tyler, who subsequently became Taney's biographer, was practicing law at Frederick in this period and became much interested in law reform, especially in regard to the procedure and pleading of the courts. Having made an elaborate report upon the subject to the State legislature, he sent a copy thereof to Taney, who acknowledged it with an interesting letter on June 12, 1854.[96] He declined to examine the report; for, at his time of life, he felt the labors of the Supreme Court session and required "repose and relaxation from business to regain my strength." To examine the report "in all its bearings" would "occupy nearly the whole summer." "The task of reforming—in other words of radically changing—the system of pleading, which is interwoven with the Common Law itself, is one of extreme difficulty and delicacy." Taney was not convinced of the success of the experiments in England and in some of the United States. "For more disputes arise as to the meaning of words in new combinations and new modes of averment; while in Common Law pleading, as it now stands, the ordinary counts in

[95] Tyler later prepared a treatise to uphold the simplified pleading, and sent Taney a copy of it, receiving from him a courteous and complimentary note of acknowledgment in return. Tyler, p. 324.

[96] Tyler, p. 16.

a declaration and ordinary pleas have a certain definite form, which conveys a certain definite meaning, about which lawyers can never doubt, or dispute." On the other hand, Taney thought that the Courts, long ago, ought to have used the power

given to them by the Legislature to give judgment according to the right of the matter, without regard to matters of form; and yet they obstinately (I must say), continued to treat as a matter of substance, what evidently was nothing but form, merely because it was called substance in some of the old law books. I fear they will continue to do so, without some specific direction from the Legislature. But when that direction is given, it will require the greatest care and consideration, to preserve all that is really essential to the common law and trial by jury and dispense with everything else. For, certainly, the proceedings ought to be so molded that the party having right on his side, should not be defeated by technicality, or nicety in pleading. But to do this by legislation, and yet preserve, in full vigor and usefulness, the great principles of the common law and trial by jury (without which, in my judgment, no free government can long exist), will require much reflection and care in matters of detail, and great perspicuity in language.[97]

In the summer of 1854, Taney went to Old Point Comfort for his vacation and there began writing an autobiography.[98] In 1855, he repeated this visit[99] and was there at the time of the yellow fever epidemic at Norfolk. Mrs. Taney caught the disease and died on September 29, and the youngest daughter, Alice, died on the following day. Taney bore up bravely under this

[97] Tyler, p. 326; Bookman, February, 1918, p. 711.

[98] Tyler prints an interesting letter of condolence from a negro slave of the Key family, p. 328.

[99] B. R. Curtis Life, I, 240. B. R. Curtis, Professional and miscellaneous Writings, Vol. II, p. 336.

heavy double blow. When Mr. Justice Curtis wrote to condole with him, he replied:

> It has pleased God to support me in the trial, and to enable me to resign myself in humble submission to His will. And I am again endeavoring to fulfil the duties which may yet remain to me in this world. But I shall enter upon those duties with the painful consciousness that they will be imperfectly discharged. The chastisement with which it has pleased God to visit me has told sensibly upon a body already worn by age, as well as upon the mind, and I shall meet you with broken health and with a broken spirit.[100]

Of this autobiography, George T. Curtis wrote that it was "one of the most beautiful pieces of that kind of writing that I know of in the English language. The late Chief Justice was master of a singularly graceful and easy style, perfectly perspicuous and correct."[101]

Mr. Justice Benjamin R. Curtis was appointed to the Bench of the Supreme Court in the year 1851, when Taney was seventy-three years old, and retired from the Bench in 1857, largely in consequence of the Dred Scott decision, which caused the relations between him and Taney to become strained. When Taney died, however, Curtis presented resolves at a meeting of the Boston Bar, held upon October 15, 1864,[102] to the effect "that the members of this Bar render tribute of their admiration and reverence for the preeminent abilities, profound learning, incorruptible integrity, and signal private virtues exhibited in the long and illustrious judicial career of the late lamented Roger B. Taney."

In his remarks, made in support of this resolution, Mr. Curtis referred to the statement that for forty

[100] Reviewing Van Santvoord's Lives of the Chief Justices, 27 So. Q. R. 331.
[101] Pages 362–363.
[102] Tyler, p. 509.

years, Taney's death might have always been expected within six months and that Taney had made such an impression on Curtis, when the latter first became judge.

His tall, thin form, not much bent with the weight of years, but exhibiting, in his carriage and motions, great muscular weakness, the apparent feebleness of his vital powers, the continual and rigid care necessary to guard what little health he had, strongly impressed casual observers with the belief that the remainder of his days must be short. But a more intimate acquaintance soon produced the conviction that his was no ordinary case, because he was no ordinary man. An accurate knowledge of his own physical condition and its necessities braced and vivified the springs of life—a temper, which long discipline had made calm and cheerful, and the consciousness that he occupied and continued usefully to fill a great and difficult office, whose duties were congenial to him, gave assurance, which the event has justified, that his life would be prolonged much beyond the allotted years of man.

While Curtis sat with Taney on the Bench, no "infirmity of the mental powers" of the Chief Justice was manifest.

Memory is that faculty which first feels the stiffness of old age. His memory was, and continued to be, alert and true as that of any man I ever knew. In consultation with his brethren, he could, and habitually did, state the facts of a voluminous and complicated case with every important detail of names and dates, with extraordinary accuracy, and, I may add, with extraordinary clearness and skill, and his recollection of the principles of law and of the decisions of the Court over which he presided was as ready as his memory of facts.

He had none of the querulousness which too often accompanies old age. There can be no doubt that his was a vehement and passionate nature, but he had subdued it. I have seen him sorely tried, when the only observable effects of the trial were silence and

a flushed cheek. So long as he lived, he preserved that quietness of temper and that consideration for the feelings and wishes of others which were as far as possible removed from weak and selfish querulousness.

Down to the last term in which he sat on the Bench, his presence was felt to be as important as at any period of his life. Curtis remembered the general impression in New England at the time of Taney's appointment as Chief Justice "that he was neither a learned nor a profound lawyer. This was certainly a mistake. His mind was thoroughly imbued with the rules of the Common Law and of equity." Curtis found, him, the

master of all that peculiar jurisprudence which it is the special province of the Courts of the United States to administer and apply. His skill in applying it was of the highest order. His power of subtle analysis exceeded that of any man I ever knew, ... but in his case it was balanced and checked by excellent common sense and by great experience in practical business, both public and private. His physical infirmities disqualified him from making those learned researches, with the results of which other great judges have illustrated and strengthened their written judgments, but it can be truly said of him that he rarely felt the need of them. The same cause prevented him from writing so large a proportion of decisions as Marshall did. As a result of this fact, his real importance in the Court may not have been appreciated. The surpassing ability of the Chief Justice and all his great qualities of character and mind were more fully and constantly exhibited in the consultation room, while presiding over and assisting in the deliberations of his brethren, than the public knew, or can ever justly appreciate. Then his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them and always for the better.

How he presided over the public sessions of the Court, some who hear me know. The blandness of his manners, the promptness, precision, and firmness which made every word he said weighty, and made very few words necessary, and the unflagging attention which he fixed on every one who addressed the Court, will be remembered by all.

But all may not know, that he had other attainments and qualities important to the prompt, orderly, and safe dispatch of business. Under Marshall, a "somewhat loose" administration of the practice of the Court had prevailed, for the amount of business was small. "No considerable inconvenience" resulted then, "but when the docket became crowded with causes and heavy arrears were accumulated, it would have been quite otherwise." Taney "made himself entirely familiar with the rules of the courts and with the circumstances out of which they had arisen. He had a notable aptitude to understand and, so far as was needed, to reform the system. It was almost a necessity of his character to have it practically complete. It *was* a necessity of his character to administer it with unyielding firmness.

He uniformly wrote the opinions of the Court upon new points of its practice. This was a very important fact, for the practice of the Court involved not merely the orderly and convenient conduct of this vast diversified business drawn from a territory so vast, but questions of constitutional law running deep into the framework of our complicated constitutional system. Upon this entire subject, the Chief Justice was vigilant, steady, and thoroughly informed.

On the only important occasion which I had the misfortune to differ with the Chief Justice on such points, I thought he, and they who agreed with him, carried the powers of the Court too far. . . . . The great powers intrusted to the Court by the Constitution and laws of his country, he steadily and firmly upheld and administered and, ... showed no disposition to exceed them.

He was as absolutely free from the slightest traces of vanity and self conceit as any man I ever knew. He was aware that many of his associates were ambitious of doing this conspicuous

part of their joint labor—"the writing of opinions—and he permitted them to do so, writing fewer ones himself for that reason." The preservation of the harmony of the members of the court and of their good will to himself was always in his mind.

His opinions were characterized by that purity of style and clearness of thought which marked whatever he wrote or spoke and some of them must always be known and recurred to as masterly discussion of their subjects.

Curtis closed this noble tribute, by saying that

It is one of the favors which the Providence of God has bestowed upon our once happy Country, that for the period of 63 years this great office has been filled by only two persons, each of whom has retained to extreme old age his great and useful qualities and powers. The stability, the uniformity and usefulness of our national jurisprudence are in no small degree, attributable to this fact.

Just about this time, a writer in the *Southern Quarterly Review* spoke of Taney's judgments

as models of judicial style and so clear and cogent in their logical power that those even who hesitate at the conclusions can scarcely see where to detect the error. Those who have been so fortunate as to hear Judge Taney from the bench are well acquainted with that inimitable manner, that patient, never-varying attention, that instant appreciation of an idea or an argument, that combination of admirable qualities—which unite to make him pre-eminently distinguished as a presiding judge.

The same writer, also stated:

The issue between the North and the South on the subject of slavery affords an illustration of the necessity for a perfectly independent judiciary and shows how difficult it is for a judge, responsible to the people of a particular section, to decide with impartiality, where the conflicting claims of two sections are

involved. The federal judiciary in its freedom from all bias, has been the great trust of the people of the South for the preservation of those rights, which only need for their support a just interpretation of the Constitution and an unprejudiced judgment on the principles of Law.

The tempest of popular feeling against Southern institutions seems to have overwhelmed, in the North, every political barrier against the invading flood of aggression. To the swelling tide, nothing seems to be opposed but the barriers of judicial independence, which the great architects of the Constitution have set up.

In the next chapter, we shall see how the tide beat against that barrier.

CHAPTER XII

The Dred Scott Case (1856–1857)

I. HISTORY OF THE CASE AND ITS DECISION

On November 2, 1855, Mr. Justice John McLean of Ohio, the senior member of the Supreme Court, upon whose bench he sat from 1829 until his death in 1864, wrote to his friend, John Teesdale, in Cincinnati,[1] "next winter, a case will be before the Court, which involves the right of a slaveholder to bring his slaves into a free State for any purpose whatever."

The Supreme Court has decided that slavery exists, by virtue of the municipal law, and is local. The Constitution gives Congress no power to institute slavery, then there can be no slavery in the territories, for there is no power but Congress which can legislate for the Territories. Squatter sovereignty is not a part of our government. When a people of a territory come to form a State government, they have a right to say whether the State shall be a free, or a slave State. And there is no more danger of a free territory becoming a slave State, than there is of a free State becoming a slave State. It is a question which belongs to the people of a State, and there is no danger in leaving a territory open to be populated by the people of the Union. More than five will settle it from the free States, where one settler will come from the slave States.

The question of slavery in the territories was the burning one in politics. The passage of the Kansas-Nebraska bill in 1854, virtually annulling the Missouri Compromise and weakening the force of the Compromise of 1850, brought to birth the Republican party, whose

[1] Bibliotheca Sacra (1899), vol. 56, p. 737.

platform on the subject took a position similar to that just quoted from McLean. The Know Nothings and the remnant of the Whigs vainly endeavored to cling to the compromises of the past. The extreme Southern Democrats claimed that slaves might be taken into any territory, while the Douglas Democrats maintained that the settlers, while the Territorial status still continued, might exclude, or admit slavery, as they wished, through their "popular sovereignty." The very foundations of the Republic rocked in the conflict, and the spirit of secession and disunion, thought to have been exercised in 1850, again raised its head.

Was it possible for any power in the country to settle the question finally? If any power could do this, was it not the august one of the United States Supreme Court? At that time, in addition to McLean and Taney, whose term had begun in 1836, there were seven other justices, all but one of whom had been appointed by Democratic Presidents. James M. Wayne[2] of Georgia, had been appointed in 1833, and loyally remained a member of the Court throughout the Civil War, and until his death in 1867. John Catron of Tennessee had been appointed in 1837, and continued on the Bench, until his death in 1865. Peter V. Daniel of Virginia was appointed in 1841, and died, while still on the Bench, in 1860. Samuel Nelson of New York was appointed in 1845, and was the last survivor of the Court as constituted at this time, living until 1872. Robert G. Grier of Pennsylvania had been appointed in 1846 and continued as a justice, until his death in 1869. Benjamin R. Curtis of Massachusetts, the only

[2] Wayne's relations with Taney were especially intimate. An undated letter from Taney, addressed to Wayne at Barnum's Hotel is extant, requesting that Wayne take New Year's dinner with Taney.

Whig Justice, had been appointed in 1851 and resigned in 1857. James A. Campbell of Alabama was the youngest in point of service, having been appointed in 1853. He was the only Justice to join the cause of the Confederate States in 1861. Five judges came from Slave States, and four from free States. As a body[3] of men, they have been well characterized as "high and capable men with a high sense of honor," but "necessarily swayed more or less by their political training and sympathies."

Before this tribunal, there came the case of Scott v. Sanford,[4] better known as the Dred Scott Case. Scott was a negro slave of Dr. John Emerson, a surgeon in the United States Army, who took him in 1834 from Rock Island, Missouri to Illinois, and two years later, to Fort Snelling, near the present city of St. Paul, Minnesota, when ordered there on government service. The first place was in the old Northwest Territory, and the second was in the Louisiana Purchase, north of the Missouri Compromise Line.[5] While in Minnesota, Scott married Harriet, another slave belonging to Emerson, and had a daughter, Eliza, born on a steamboat, north of the north boundary of Missouri.[6]

After about two years, Dr. Emerson returned to Missouri, taking Scott and his family with him. A

[3] Balch "A World Court," p. 111.

[4] 19 Howard, also separately printed. The name of the appellee is usually printed erroneously, Sandford.

[5] The history of the case has been studied with great care by F. N. Hill, in his "Decisive Battles of the Law." Harper's Magazine for July, 1907, at page 244. See also 8 McMaster's U. S.; p. 278. Connor's Life of J. A. Campbell, pp. 54 &ff. gives a careful study of the case as far as Campbell was concerned.

[6] Blair, in his Brief before the Supreme Court, raised the question of the status of this child, but the Court made no reference to it in any of the opinions. Cf. Ewing Legal and Historical Status of the Dred Scott Case, p. 107.

second daughter, Lizzie, was born to Scott and his wife in Jefferson Barracks, after the return. Some time later, Dr. Emerson died, in Davenport, Iowa, leaving his property to his wife in trust for his child. Mrs. Emerson could not, therefore, emancipate Scott, who was then about thirty-four years old and she removed to Massachusetts, leaving him in St. Louis, where he became a charge upon the bounty of Mr. Taylor Blow, who was a Southern sympathizer and was a son of Scott's old master in Virginia, who had sold him to Dr. Emerson. At a loss to know what to do with Scott, it is thought that Blow brought him to the law firm of Field and Hall, in the hope that they could find some solution of the difficulty. They brought suit, claiming Scott's freedom, and with the probable ulterior purpose of paving the way for a further suit against the Emerson estate for twelve years' wages, if Scott had been illegally held in servitude.[7] Frederick T. Hill doubts whether Mrs. Irene Emerson would otherwise have defended the suit brought against her by this wholly illiterate negro, in the autumn of 1846, upon the technical grounds of false imprisonment and assault and battery. A second suit by him against Emerson's heirs, was docketted in 1847, as was one brought by his wife and children. In April, 1847, the Circuit Court Judge instructed the jury to bring in a verdict for the defendant. A new trial was granted by another judge,[8] and, on January, 1850, a jury gave a verdict for Scott. The Emerson estate then appealed to the State Supreme Court, and Scott was placed in the hands of the sheriff,

[7] 4 Hart's "Am. Hist. as told by Contemporaries," 122, prints some of the papers in this case. 13 Am. State Trials 220 also prints papers in this case.

[8] Vide 11 Mo. Rep. 413, for unsuccessful appeal from order for the new trial.

to be hired out, an account for his wages being given to the successful party to the suit. The payment of the costs was guaranteed by a bond signed by Blow's son-in-law, Joseph Charless. In March 1852, the Missouri Supreme Court took up the case,[9] and decided against Scott's freedom. There was a dissenting opinion, and Hill well writes that both judges "displayed more temper than erudition." "The Court was a small one, numbering only three justices. Nicolay and Hay[10] considered that the majority opinion bore internal evidence that it was prompted, not by considerations of law and justice; but by a spirit of retaliation, growing out of the ineradicable antagonism between freedom and slavery," while the dissenting Judge, Chief Justice Gamble, replied to "this partisan bravado" with a "dignified rebuke."

Meanwhile, Mrs. Emerson had remarried, her second husband being Dr. Calvin C. Chaffee of Springfield, Massachusetts, an anti-slavery member of Congress. Soon after the final decision in Missouri, Chauvette E. L. Beaume, a lawyer related by marriage to Blow, approached Roswell M. Field, in reference to having a suit for freedom brought by Scott in the Federal Court. Field agreed to do so, and to avoid bringing Mrs. Chaffee into the case, the ownership of Scott was transferred to her brother, John F. Sanford of New York, whose name is wrongly spelled "Sandford," by the Reporter. Suit was then brought for assault against Sanford, in the United States Circuit Court, federal jurisdiction being secured, because Sanford did not live in Missouri. This averment was traversed by Sanford's attorneys by a plea in abatement, denying that the

[9] It is reported in 15 Mo. Repts. 582. See also 13 Am. State Trials 233.
[10] Life of Lincoln, Vol. II, p. 61.

Court had jurisdiction, on the ground that Scott was a descendant of an African slave and born in slavery. The Circuit Court overruled the plea in abatement, but found for the defendant on the merits of the case.

The case was heard at the April term of 1854, and in May the Judge instructed the jury to bring verdict against Scott. An appeal[11] was then filed, Blow acting as Scott's bondsman. Garland and Morris had previously represented the owner, but they were now succeeded by Henry S. Geyer, a native of Frederick County, Maryland, who had recently defeated Thomas H. Benton in a contest for election to the United States Senate, and who was a leader of the St. Louis Bar. "Seeing how deeply the country was interested in the decision,"[12] Reverdy Johnson volunteered to assist him, and they argued the case for the master before the Supreme Court.

On May 15, 1854, the Kansas-Nebraska Bill was passed, virtually repealing the Missouri Compromise. On May 25, Field wrote Montgomery Blair that he believed that it would be better for the country to have the vexed question of slavery restriction decided contrary to his wishes, and in favor of the slaveowner, than not at all. On December 24, he wrote Blair again:

> A year ago, I was employed to bring suit for Scott. The question involved is the much vexed one, whether the removal by the master of his slave to Illinois, or Wisconsin, works an absolute emancipation. . . . . If you, or any other gentleman at Washington, should feel interest enough in the case as to bring it to a hearing and decision by the Court, the cause of humanity may perhaps be subserved, and, at all events, a much disputed question would be settled by the highest Court of the nation.

[11] Montgomery Blair, see 13 Am. State Trials 242, and H. A. Garland signed the agreed statement of facts.

[12] Tyler, p. 388.

Blair consented, but the above given narrative shows clearly that he and his family were not responsible for the suit, as has been stated. The case was argued at the December Term of 1855, on February 11, 1856, and was ignored by the newspapers. In the "discussions at the conferences of the judges" there was "much division among them," we are told by Justice Campbell,[13] especially as to whether the plea in abatement, which concerned Scott's status as a "negro of African descent," whose ancestors had been imported as slaves, was for consideration. According to Campbell, McLean, Catron, Grier, and Campbell, forming a minority of the court, held that his plea was not open for examination, because a demurrer had been sustained against it. Taney, Wayne, Daniel, and Curtis held otherwise, and Nelson, who inclined to that view, proposed a reargument of the case at the next term, which proposition was agreed to without objection.

On April 8, Mr. Justice Curtis wrote George Ticknor[14] that "the Court will not decide a question of the Missouri Compromise—a majority of the judges being of the opinion that it is not necessary to do so. This is confidential." On May 12, 1856, a reargument of the case was granted.

[13] Letter of November 24, 1870. Tyler, p. 382. McHenry Howard, Esq., on May 1, 1919, wrote that "S. Teackle Wallis told me, about 1875, that his friend, George S. Hillard, a well known literary man of Massachusetts, told him that on some public, or semi-public occasion, in New England, Justice Curtis, of the Supreme Court, said that, in the consultation over the decision to be rendered in the Dred Scott Case, the Justices became much excited and rose to their feet, arguing and gesticulating—and Chief Justice Taney rapped on the table and said: "Brothers, this is the Supreme Court of the United States. Take your seats." "And," said Curtis, "we sat down like rebuked schoolboys."

[14] B. R. Curtis Life, I, 180. Howe's "Political History of Succession," Ch. XV. treats of the case.

Blair wrote to the Editor of the *National Intelligencer*, on December 24, that he had tried in vain to gain another distinguished counsel to aid him in the case. Finally, he secured George Ticknor Curtis[15] and he argued the "question of the power of Congress to prohibit slavery in the Territories," as Justice Curtis wrote George Ticknor, "in a manner exceedingly creditable to himself and the bar of New England. Judge Catron told me it was the best argument on a question of constitutional law he had heard in the Court—and he has been here since Jackson's time."[16] Curtis added: "Our aged Chief Justice, who will be eighty years in a few days, and who grows more feeble in body but retains his alacrity and force of mind wonderfully, is not able to write much."

Blair forced the fighting on a broad ground in his brief, asking whether Congress had power to prohibit slavery in the Territories, or whether the Constitution carried slavery into the Territories. The intermediate position of squatter sovereignty, he declared to be wholly *ad captandum*, not resting upon any basis recognized by the Supreme Court. The question "involves its present importance," to use his words, "from the fact that it is felt to involve the character of the country as a free or slave country, and a revolution in the ideas on

[15] George T. Curtis (B. R. Curtis, Life, I, 249) wrote in after years that Blair "who had sole charge of the case for Scott," asked Curtis to assist in the argument, about three days before the case was called, and that he argued the affirmative of the proposition that Congress could prohibit the existence of slavery in the territories, not discussing the other question whether a free negro could be a citizen. Curtis's argument was printed, at the request of Crittenden of Kentucky and Badger of North Carolina, so that he could proudly remark that some of the ablest minds in the South did not regard it as supremely important to their sectional interests to have the Missouri Compromise declared unconstitutional.

[16] B. R. Curtis, Life, I, p. 194.

which the government was formed, which must subvert it, if acquiesced in."

He discussed four questions, viz.: (1) whether the plea to the jurisdiction, alleging that the plaintiff was a negro, and, therefore, not able to maintain a suit as a citizen of Missouri, was waived by pleading to the merits, after a demurrer sustained; (2) whether a negro is a citizen in such a sense as to enable him to maintain an action in the Courts of the United States; (3) whether the facts stated in the agreed case entitle the plaintiff and his family, or either of them, to freedom; and (4) whether the Missouri Compromise is valid.[17] He argued these points on December 18, 1856, and the author of B. R. Curtis's Life[18] tells us that Sanford's counsel also elaborately argued the same[19] points.

Alexander H. Stephens of Georgia was a Union man, and was anxious to settle the question of slavery in the territories, which was arousing the forces tending toward disunion. On December 15, 1856, he wrote his brother, Linton:

I have been urging all the influence I could bring to bear upon the Supreme Court to get them postpone no longer the case on the Missouri restriction before them, but to decide it.[20] They take it up today. If they think, as I have reason to believe they will, that the restriction was unconstitutional, that Congress had no power to pass it, then the question—the political question, as I think, will be ended as to the power of the people in their territorial legislature. It will be in effect a *res adjudicata*. The only ground upon which that claim of power can then rest will

[17] Geyer, in his argument, maintained that a Territory was unappropriated land.

[18] Vol. I, page 206.

[19] The text states that he was Terry,—does the author mean Geyer?

[20] Johnston and Browne's Stephens, p. 316. Harper's Magazine, July, 1907, p. 251.

be General Cass's squatter sovereignty doctrine, i.e., that they possess the power, not by delegation, but by inherent right, and you know my opinion of that.

He wrote his brother again, on January 1, 1857:

Today, I send you the speech of Curtis in the Dred Scott Case before the Supreme Court. The speech, I think chaste, elegant, forensic, but I do not think it convincing. The case is yet undecided. It is the great case before the Court, and involves the greatest question politically of the day. I mean that the questions involved—let them be decided as they may—will have a greater political effect and bearing than any other of the day. The decision will be a marked epoch in our history. I feel a deep solicitude as to how it will be. From what I hear, *sub rosa*, it will be according to my own opinions on every point as abstract political questions. The restriction of 1820 will be held unconstitutional. The judges are all writing out their opinions, I believe, *seriatim*. The Chief Justice will give an elaborate one. Should this opinion be as I suppose it will, "Squatter Sovereignty speeches" will be upon a par with "Liberty speeches" at the North in the last Canvass.[21]

Stephens had true prescience, but he was a little ahead of time.

Other persons soon had the same idea. James Pike, the Washington correspondent for the *New York Tribune*, wrote his newspaper on January 5.[22]

The rumor that the Supreme Court has decided against the constitutionality of the power of Congress to restrict slavery in the Territories has been commented upon, in the most reserved manner, at this metropolis. It is very generally considered that the moral weight of such a decision would be at least equal to that of a political stump speech of a slaveholder or a doughface.

[21] Johnston and Browne's Stephens, p. 318.

[22] Pike, "First Blows of the Civil War," p. 355.

Many have expressed the opinion that the question would not be met by the Court, and numbers are still of that way of thinking. It makes but little difference to slavery whether it gets a decision in its favor, now, or after the public mind shall have had time to cool a little. But it would be best for antislavery that the decision should come now, while the popular heart is in a fused condition. The impression it would make would be deeper and more distinct and the whole series of proslavery aggressions and triumphs would then be burned into it together. The Congress, the Court, and the Executive would then take their proper positions of joint association in the mind of the people, as confederates in the work of extending the intolerable nuisance of slavery. It is, therefore, to be preferred that the judicial department shall now put itself actively upon the side of the slaveholders, while the mind of the country is warm and burning, rather than wait and do it by and by, when apathy shall have again overspread it. When a political scheme is to be furthered by judicial action, it is a thousand times better that action should be taken boldly; when every man, woman, and child have their eyes upon the Court, than to have that body steal silently and stealthily in the same direction. Judicial tyranny is hard enough to resist under ordinary circumstances, for it comes in the guise of impartiality and with the prestige of fairness.

At first, however, the Court determined not to make a broad decision, but merely to decide the case on narrow grounds, and Justice Nelson was asked to write the opinion, limiting it to the "particular circumstances" of Dred Scott.[23] Wayne, who like Stephens, was a Georgian, became convinced, probably by his efforts after the second hearing, that the Supreme Court could quiet all agitation on the question of slavery in the Territories, by affirming that Congress had no power to prohibit it there.[24] "With entirely patriotic motives,

[23] Tyler, p. 384.

[24] Curtis's Life, I, 206.

and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the Court. His frank avowals in conversation at the time," showed "that he regarded it as a matter of great good fortune to his own section of the country that he had succeeded in producing a determination on the part of a sufficient number of his brethren to act upon the constitutional question, which had so divided the people." He persuaded Taney, Grier, and Catron to take this view. Wayne's urgency on the other justices was great, and he "particularly suggested"[25] to Catron the ground upon which he concurred—that the Missouri Compromise conflicted with the Louisiana Treaty. Campbell and Nelson wrote,[26] in after years, that, after Nelson had written his opinion and in his absence,[27] Wayne, without giving notice to anyone, stated in the consultation room "that the case had created public interest and expectation," and "proposed that the Chief Justice write an opinion on all of the questions, as the opinion of the Court." This proposal was assented to. Nelson, however, refused to agree to this plan, and, when told of it, "gave notice" that he would read, as his own, the opinion he had written as that of the Court. Pressure from both sides urged the Court on, however, and it transpired that Justice McLean was taking a broad ground in his expected dissenting opinion, and would give comfort to the anti-slavery forces. Reverdy Johnson, in a letter, dated March 6, 1858, written to a public meeting,[28] claimed that the course of the dissent-

[25] Curtis's Life, I, 234. See Campbell on Curtis in 20 Wallace. Wayne's papers have been destroyed.

[26] Tyler, p. 384.

[27] Tyler, p. 385.

[28] B. R. Curtis, Life, I, 237.Tyler, p. 390.

ing justices made it the duty of the court to correct, to the whole extent of their power, what they believed to be the serious constitutional errors, which, if left unobstructed, would be fastened upon the government.

James Buchanan had been elected President in the preceding November, and, on February 19, his old friend, Mr. Justice Catron, wrote him that the case had been before the Justices several times within the past week, and that Buchanan might safely say in his inaugural address that:

> The question involving the constitutionality of the Missouri Compromise line is presented to the appropriate tribunal to decide (to wit the Supreme Court of the United States). It is due to its high and independent character to suppose that it will decide and settle a controversy which has so long and so seriously agitated the country and which must ultimately be decided by the Supreme Court. And until the case now before it . . . . is disposed of, I would deem it improper to express any opinion on the subject.[29]

Catron continued his letter that "a majority of my Brethren will be forced up to this point by two dissentients" and asked Buchanan to write Mr. Justice Grier, who, like the President elect, was a citizen of Pennsylvania, "saying how necessary it is and how good the opportunity is to settle the agitation, by an affirmative decision of the Supreme Court, the one way or the other. He ought not to occupy so doubtful a ground as the outside issue—that admitting the constitutionality of the Missouri Compromise line of 1820, still, as no domicile was acquired by the negro at Fort Snelling and he returned to Missouri, he was not free. He has no doubt about the question on the main contest, but has

[29] Buchanan's Works, X, 106. I cannot find Justice Catron's papers.

been persuaded to take the smooth handle for the sake of peace."

Buchanan wrote to Grier at once, as Catron requested, and received an answer dated February 23.[30] Buchanan's letter had reached him on that day, and he had shown it to Wayne and Taney: "We fully appreciate and concur in your views as to the desirableness, at this time, of having an expression of the opinion of this Court, on this troublesome question. With their concurrence, I will give you, in confidence, the history of the case before us, with the probable result." Owing to the illness of a judge, the case had only lately been taken up in conference. The first question was as to the right of a negro to sue in the Courts of the United States. "The majority of the Court were of the opinion that the question did not arise on the pleadings and that we were not compelled to give an opinion on the matter. After much discussion, it was finally agreed that the merits of the case might be satisfactorily decided without giving an opinion on the question of the Missouri Compromise, and the case was committed to Justice Nelson to write the opinion of the Court, affirming the judgment of the court below, but leaving both those difficult questions untouched." Then it appeared that the two dissentients, especially Mc Lean, "were determined to come out in long and labored dissent, including their opinions and arguments on both these troublesome points, although not necessary to a decision of the case. In our opinion, both these points are in the case, and may be decided." The majority felt now compelled to express an opinion upon the "powers of Congress and the validity of the Compromise." Nelson and Grier had refused to commit them-

[30] Buchanan's Works, X, p. 106. I cannot find Grier's papers.

selves. "The majority, including all the judges south of Mason and Dixon's line, agreeing in the result, but not in their reasons, as the question will be thus forced upon us, as I am anxious that it should not appear that the line of latitude should mark the line of division in the Court, I feel also that the opinion of the majority will fail of much of its effect, if founded on clashing and inconsistent arguments." Consequently, Grier had conversed with Taney and had decided to concur with him. He and Wayne would endeavor to have Daniel, Catron, and Campbell do the same:

> So that, is the question must be met, there will be an opinion of the Court upon it, if possible, without the contradictory views which would weaken its force. But, I fear, some rather extreme views may be thrown out by some of our Southern Brethren. There will, therefore, be six, if not seven (perhaps Nelson will remain neutral) who will decide the compromise law of 1820 to be of none effect. But the opinions will not be rendered before Friday, the sixth of March.[31] We will not let any others of our brethren know anything about the cause of our anxiety to produce this result, and, though contrary to our usual practice, we have thought it due to you to state to you, in candor and in confidence, the real state of the matter.

On February 27, Mr. Justice Curtis wrote a true forecast of events to his uncle, George Ticknor, who was then in Europe: "The North is now quiet[32] after a sectional excitement such as was never before known; but I am greatly mistaken if events do not arouse it again to an exertion to overthrow what is called the 'slave' power, even greater than that recently made."

[31] The weak state of Taney's health caused the postponement of the decision. A recent article in 52 Am. Law Rev. 875, by Henry S. Forster, is entitled "Did the Decision in the Dred Scott Case Lead to the Civil War" and reproduces this correspondence.

[32] Curtis, Life, I, p. 193.

He was right, and the Supreme Court was destined to liberate the genie from the bottle.

Rumors spread as to the purport of the coming decision, and, on March 2, the *New York Tribune*,[33] from a "trustworthy source," predicted that the decision by a large majority would "sustain the extreme Southern ground," denying the constitutionality of the Missouri Compromise and that McLean and Curtis would be the only dissenters.

Buchanan brought his inaugural address with him to Washington, and, after his arrival at the National Hotel there, made "no alterations"[34] except to insert "a clause in regard to the question then pending in the Supreme Court, as one which would dispose of a vexed and dangerous topic by the highest judicial authority of the land." When he read his address on March 4, he said: "A difference of opinion has arisen in regard to the point of time, when the people of a Territory shall decide" as to the admission of slavery for themselves.

> This is, happily, a matter of little practical importance, Besides it is a judicial question which legitimately belongs to the Supreme Court of the United States,[35] before whom it is now pending and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be, though it has ever been my individual opinion that, under the Nebraska-Kansas Act, the appropriate period would be when the number of actual residents in the Territory shall justify the formation of a constitution, with a view to its admission as a State into the Union.

[33] Rhodes, II, 269.

[34] Letter of Buchanan's nephew, James Buchanan Henry, to George T. Curtis, in Curtis's Buchanan, II, 187.

[35] Buchanan's Works, X, 106.

This statement was one which almost anyone could have made who read the daily newspapers and any further information which Buchanan had, came from Catron and Grier; yet, after the decision, an unfounded and rather ridiculous charge of conspiracy between Taney and Buchanan was made by anti-slavery leaders, such as Lincoln. It was even felt necessary by Stephen A. Douglas, publicly, to deny that he had talked with Taney concerning the decision, before it was delivered.[36]

Mr. Justice Curtis never gave countenance to this charge,[37] and Rhodes, an unfriendly critic,[38] admits that the characters of Buchanan and Taney are proofs that "the import of the decision" was not communicated by the Chief Justice to the President elect, and that, with the former's "lofty notions of what belonged to an independent judiciary, he would have had no intercourse with the executive that could not brook the light of day."

Reverence for the Supreme Court had never been higher than at the moment of the decision. On the very day of the inauguration, Caleb Cushing, the Attorney General, thus addressed the tribunal: "You are the incarnate mind of the political body of our nation." You are "the pivot, upon which the right of all—government and people alike—turn: or rather, you are the central light of constitutional wisdom, around which they perpetually revolve."[39] With such incense in their nostrils, there is little cause for wonder

[36] Lincoln's Works, I, 243 at Springfield, Ill., before Republican convention which nominated him for Senator, 293, 303; at Ottawa, Illinois, August 21, 1858, joint debate with Douglas, 419; at Quincy, Illinois, in joint debate 496. For disproof, if needed, see Tyler, p. 383 and ff.

[37] Life, I, 236.

[38] History, II, 269.

[39] Nicolay and Hay's Lincoln, vol. II, p. 70.

that Taney and the other majority justices believed, mistakenly, that the "public excitement" in reference to slavery in the Territories could be quieted by a judicial decision, and that they, though "required only to decide a question of private rights," rejecting for the occasion the sound rule of not mingling in political questions, should "thrust themselves forward to sit as umpires in a quarrel of parties and factions."[40]

On the fifth of March, Pike, in writing to the *Tribune*, thus referred to Buchanan's speech:[41]

> This policy of planting the Federal Government on the side of an open, undisguised, entire devotion to the interests of slavery and demanding conformity thereto of all participants in its administration, has been gradually forcing its way, through fogs and murky darkness, its existence doubted and denied, whenever partisan interest required the denial; until, at last, this policy bursts upon the country and upon the world in the unaugural of Mr. Buchanan and in the coming decision of the Supreme Court upon the right of Congress to restrict slavery in the territory, with a distinctness and clearness as impressive and alarming as it is vivid.

Taney's opinion was somewhat modified after it was read. In this present form, it covers 60 of the Reporter's pages devoted to this case. Corwin correctly states that what Taney wrote was "absurdly labeled" the Court's opinion, for, on most points of argument, there was no majority of the Court.[42] Before the decision was pronounced,[43] "Taney, both in character and ability," in Rhodes's opinion, "stood much higher than any other member of the court. . . . . The

[40] Curtis' Life, I, 236. Nicolay and Hay's Lincoln, II, 71.
[41] "First Blows of the Civil War," p. 366.
[42] Doctrine of Judicial Review, p. 132.
[43] Rhodes' History of U. S., II, 254 to 266.

bait held out to his patriotic soul was that the court had the power and opportunity of settling the slavery question." His "opinion shows no weakness of memory, or abated powers of reasoning. . . . . That a man of the years of Taney could construct so vigorous and so plausible an argument was less remarkable than that a humane Christian man could assert publicly such a monstrous theory. Yet such work was demanded by slavery of her votaries. The opinion of Taney was but the doctrine of Calhoun announced for the first time in 1847,"[44] which "outraged precedent, history, and justice." Taney "committed a grievous fault," in taking a step which undermined "the very foundations of the State." "Patriotism and not selfseeking impelled him," yet "the higher motive does not excuse the Chief Justice." His "argument impressed" Rhodes "with its power. It is inhuman. It was effectually refuted. But it was a great piece of specious reasoning, and, translated by Douglas into the language of the stump, it made the staple argument of Northern Democrats from this time to the war."

Taney found two leading questions in this controversy, of the highest importance. First, had the Circuit Court Jurisdiction, and second, if so, was its judgment erroneous? He refused to admit that the plea in abatement was not before the Court, as the judgment thereon, in the Court below, was in Scott's favor, and held that Sanford had waived that defence, by pleading to the merits.

The "peculiar and limited jurisdiction" of the United States Courts had to be considered, for the Government of the United States is "sovereign and supreme in its appropriate sphere of action, yet it does not possess all

[44] See Cong. Globe for February 19, 1847, p. 455 and App. 1848, p. 1178.

the powers which usually belong to the sovereignty of a nation." Consequently, the record must show *affirmatively*, that the Circuit Court had jurisdiction.

The writ of error brought up the *whole* record of the proceedings in the Court below, and so the plea in abatement was before the Supreme Court. Taney, therefore, asked whether a negro can "become entitled to all the rights and privileges and immunities guaranteed" by the Constitution to citizens, including the privilege of suing in the Federal Courts? Taney distinguished the status of negroes from that of Indians, whose "freedom has constantly been acknowledged." The phrase, "people of the United States," familiarly called "the sovereign people," Taney held to be synonymous with citizens. Every citizen is a constituted member of this sovereignty." The negroes are not included, and were not intended by the Constitution to be included in "the people;" but were considered a "subordinate and inferior race of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges, but such as those who held the power and the government might choose to grant them."

Taney next showed how his inveterate Federalism had blended itself with his pro-slavery arguments, for he distinguished State citizenship from that in the United States and held that "it does not, by any means, follow, because he had all the rights and privileges of a citizen of a State," that any man "must be a citizen of the United States," so as to be entitled to the rights and privileges of a citizen in any other State. Before the adoption of the Federal Constitution, each State made its citizens, and it may still "confer on whom-

soever it pleased the character of citizen" and "endow him with all its rights," even though he be an alien, yet "he would not be a citizen, in the sense in which that word is used in the Constitution of the United States." The provision that the Federal Government should establish an uniform rule of naturalization, proved, to Taney's mind, the proposition that there was a National citizenship. It was "very clear" to him "that no State can, by a law made since the Constitution,[45] introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community, by making him a member of its own, and, for the same reason, it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it."

He then adds: "Does the Federal Constitution, whenever a negro" shall be made free under the laws of a State, "raise him" to the rank of a citizen, and, immediately, clothe him with all the privileges of a citizen in every other State and in its own Courts? The "Court thinks," was Taney's reply, "the affirmative of these propositions cannot be maintained, and, if it cannot," the plaintiff was not a citizen of the State of Missouri, and so could not sue in the United States Courts.

It was true that "every person, and every class and description of persons, who were, at the time of the adoption of the Constitution, recognized as citizens of

[45] Page 12. McHenry Howard, Esq., states that his father, Charles Howard, who married Mrs. Taney's niece, stated that Taney wrote the headnotes to the Dred Scott Case.

the several States, became also citizens of this new political body;" but Taney held that the "legislation and history of the times and the language used in the Declaration of Independence show that, neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people." He then endeavored to prove this startling assertion. It was unprovable. Taney was a feeble, old man, had no great amount of time for research, and had collected little evidence of his assertion. He stated that, for more than a century, before the Declaration of Independence and the Constitution were adopted, negroes had "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social, or political relations, and, so far inferior, that they had no rights which the white man was bound to respect, and that the negro might, justly and lawfully, be reduced to slavery for his benefit."

The phraseology was unfortunate, and the sentiment false and inhuman, though it was uttered by a humane and truthful man. The people of the Northern States forgot the language of the rest of the opinion, and repeated, in horror struck tones, that Judge Taney believed that the negro "had no rights which the white man was bound to respect," a statement which was rather unfair toward Taney, but which became an effective weapon against slavery.[46] Taney's statement was inaccurate as to history and law, and Curtis soon showed its manifest untruth; but even had it been true, it would have

[46] Cf. Rhodes, II, 265. Taney had no prejudice against negroes, and said to a friend: "Thank God that at least in one place all men are equal—in the Church of God. I do not consider it any degradation to kneel side by side with a negro in the house of our Heavenly Father." J. A. Walter, in Century Magazine, 1883, p. 958.

been "unwise and unchristian to embody it in such a sentence."[47] It was a "grievous fault," and grievously did its author answer it. Reverdy Johnson, in his remarks at the meeting of the Bar after Taney's death, defending his friend, said that "Taney mentioned the fact, not to justify, but to deplore it."[48] I can find no evidence of this deploring in Taney's words.

Taney thus continued his cold, unemotional statement: "He was brought and sold and treated as an ordinary article of merchandise and traffic, whenever a profit could be made from it. This opinion was, at that time, fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals, as well as in politics, which no one thought of disputing, or supposed open to dispute."

What proofs did Taney bring of this sweeping statement? Grossly inadequate ones. In Massachusetts, a negro was whipped who hit a white man, and, in Maryland, and in Massachusetts, intermarriage between whites and blacks was forbidden. No stronger proofs were adduced. These instances showed the "degraded condition of this unhappy race" and that a "perpetual and impassible barrier was intended to be erected" between the two races, which statement might well be true, and yet not prove Taney's point—that the negro had not rights. He was correct, of course, in stating that the "*enslaved* African race were not intended to be included" in the words of the Declaration of Independence that "all men are created equal;" but this fact does not show that *free* negroes were excluded from that political equality.

[47] Nicolay and Hay, II, 77.

[48] Vide Tyler, p. 494. Century Magazine, 1883, p. 957–8, prints letters by J. A. Walter and Courtenay De Kalb, defending Taney's use of the phrase that negroes "had no rights which the white man was bound to respect."

His next argument was that the foreign slave trade and fugitive slave provisions of the Federal Constitution, show that negroes "were not regarded as a portion of the people, or citizens of the government then formed," but this seems a *non sequitur*. Because negro slaves had certain treatment, it does not follow that negro freemen were not citizens, nor is it "obvious," as Taney wrote, "that they were not in the minds of the framers of the Constitution," when they gave rights to the citizens of one State within the limits of another. An unworthy and illogical slur upon New England followed, when Taney stated that it could hardly be supposed that in the States whose citizens engaged in the slave trade, "the people could have regarded those who were emancipated, as entitled to equal rights with themselves." The history of the freedmen in Rome, was an answer to this statement.

Then Taney took up the State laws as proving his point, forgetting that in his own state, negroes were voters in his youth.[49] In Kentucky, a Court had decided that a free negro was no citizen. Connecticut,[50] up to the time of adopting the Constitution, had nothing in her legislation "indicating that it meant to place" negroes, when free, upon a level with its citizens—surely a lame argument. He showed that there was a popular prejudice against negroes in Connecticut, as manifested in the case of Miss Prudence Crandall, as if popular prejudice had the force of law.[51] In New

[49] Steiner's "Citizenship and Suffrage in Maryland," 27, 29, 31.

[50] Larned (15 New Eng., p. 513) shows that a Connecticut law of 1774, (which was a re-enactment of one of 1702), which dealt with *all* vagrant or suspected persons, showed that, if free negroes were associated with slaves under the law, they were also associated with white vagrants, no race distinction being made. Free negroes voted in Connecticut until 1818.

[51] Larned, in 15 New Englander 515, showed that there was no legal decision here to support Taney's opinion.

Hampshire, only free, white citizens were allowed in the militia, so the negro "forms no part of the sovereignty of the State." One may reply that no more do men above military age, yet their citizenship continues. Rhode Island forbade intermarriage of the races, and Chancellor Kent said that, only in Maine, did "negroes participate, equally with the whites, in the exercise of civil and political rights." It will hardly be believed that this pitifully meagre array of evidence was all that Taney presented.[52] Yet from that paltry evidence, he made the broad assumption that "it is hardly consistent with the respect due to the States, to suppose that they regarded, at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized, or that the slave-holding States would have consented to a Constitution which might compel them to receive negroes as citizens from another state and so be exempt from police regulations." The answers to this latter statement are that no one expected any extensive migration of negroes, and that "police regulations" of all citizens of a State remained in the hands of its authorities; after the adoption of the Constitution, just as before that time. "This want of foresight and care" by the framers of the Constitution, probably occurred, even though Taney thought it "would have been utterly inconsistent with the caution displayed in providing for the admission of new members into the political family" by naturalization. The Constitution, undoubtedly, gave to Congress the sole power to confer citizenship on those born in foreign

[52] Sumner noted (works v. 179) in 1860, that the Constitution of Missouri said free *white* male citizens, implying that there might be colored citizens and that certain sections of the Alabama Code stated that they did not affect "a free person of color, who, by the treaty between the United States and Spain, became a citizen of the United States, or the descendants of such!"

countries.[53] In the Articles of Confederation, the words "free inhabitants," did not include negroes, according to Taney's contention; since requisitions for soldiers in the Revolution were made on the States in proportion to the number of "white inhabitants."[54] It is impossible to follow Taney, when this fact causes him to exclaim: "Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject, the free, and the subjugated races!"

Naturalization is only for free white persons, since Citizenship, when the Constitution was adopted, "was perfectly understood to be confined to the white race, and that they alone constituted the sovereignty of government." Then he destroys the force of his argument, that admitting that Congress might naturalize negroes and certainly might have naturalized Indians, had they not been too cruel, and that no one thought that they would ask for citizenship.

Then Taney groups certain laws as further proofs that, "to call persons thus marked and stigmatized, citizens of the United States—fellow citizens—a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations." These laws were the militia law of 1792, which said that only "free able-bodied white male citizens"[55] should serve; the law of 1813 which provided that only "citizens of

[53] Larned, 15 New Eng. p. 520, insists that under the Constitution, *white* might have been left out of the naturalization act.

[54] Larned (15 New Eng. 520) maintained that negroes were included under the term, "free inhabitants," as proved by the fact that, when South Carolina moved to insert the word "white" in the Articles of Confederation, two States voted for it, eight against it, and one was divided.

[55] Larned (15 New Eng. 524) maintained that this law proves, by its language, that there were free citizens, not white.

the United States, or persons of color, natives of the United States," could be employed on ships;[56] and the law of 1820, which restrained the nightly, disorderly meetings of slaves, free negroes, and mulattoes in the District of Columbia. Here, again, his evidence did not establish his thesis.[57]

In his earlier years, Taney had represented before the Supreme Court, as attorney, the defendant in the case of Le Grand v. Darnall[58] and his client had been described as a negro. Blair had cited the case in his brief, and Taney floundered about, in trying to avoid its conclusiveness. In doing so, he made the remarkable statement, that as a person may be a citizen, though exercising no share of the political power, so a person may vote in a State by virtue of its law, and be a non-naturalized foreigner or a negro. The fact was that, just as Marshall decided the Dartmouth College Case without defining a contract, so his successor was deciding this case without defining the word "citizen."

Then comes another assumption, that the Federal Government has no right to interfere with slavery, but must protect the rights of the slaveowners. "To deal with the negro, is a power which the States evidently intended to reserve to themselves."

The plea in abatement was before the Court; but, if it had not been there, an exception admitted that Scott was born a slave, and, if his removal from Missouri did not give him freedom, he was a slave and not a citizen, so that the case must be dismissed. The discussion of

[56] Taney insisted that these two classes were virtually exclusive, but may it not be argued that the second class was added to permit the employment of slaves?

[57] He also stated that Wirt and Caleb Cushing, while Attorneys General, had not considered negroes as citizens.

[58] 2 Peters 670.

the merits of the case was not *obiter*, for the Supreme Court had the right to revise the judgment of the Circuit Court, and to revise it for any error *apparent* on the record. Taney distinguished this case from a writ of error to a State Court. As the Circuit Court was wrong in overruling the plea in abatement, the Supreme Court must correct the error, and not leave an erroneous judgment in full force and an injured party without remedy. It is difficult to see how this statement fits this case, for Sanford was not injured by the decision below, and, if Scott was a slave, he had received substantial justice. Taney now proceeded to inquire whether the facts relied on by Scott entitled him to freedom, without which inquiry the Court would sanction an error which is patent on the record, and which might be a precedent, and lead to serious mischief in some future suit; though it made no difference as to this one. A long discussion followed as to the Western lands.[59] The words, "territory and other property," in the Constitution, transfer to the new government property *then* held in common by the States, and have no reference whatever to any territory acquired *in the future*. The power to control is limited to the territory then in existence, nor are the words used such as are usually used in giving powers of legislation.[60] Of course, citizens who emigrate to Territory belonging to the people of the United States, cannot be ruled as mere colonists. "The principle upon which our Governments rest, and upon which alone they continue to exist, is the Union of States, sovereign and independent

[59] Are these the 16 pages which Taney added to his opinion after delivering it?

[60] Taney tries hard to distinguish the case from Am. Ins. Co. v. Canter 1 Peters 511.

within their own limits, in their internal and domestic affairs." Taney found that principle somehow inconsistent with a grant of power to the General Government "to hold colonies and dependent territories." Congress had no unlimited power to pass laws for the Louisiana Purchase, but did so, as "representative and trustee of the people." The rights of property of citizens are preserved by the Fifth Amendment to the constitution, and Taney saw no difference between slaves and other property,[61] so that the Missouri act, prohibiting citizens from "holding and owning property of this kind" (i.e., slaves) in a part of the territory of the United States was void. Surely, this is a strained and strange construction of the Constitution!

The case of Strader v. Graham,[62] is held as a precedent to show that the residence of Scott in Illinois did not free him.

"Upon a careful examination of all the cases decided in the State Courts of Missouri," Taney reached the amazing conclusion, which was amply refuted by Curtis, that "it is now firmly settled by the decisions of the highest Court in the State," that Scott and his wife[63] are not free. Anyhow, the case should have been appealed from the Missouri Supreme Court, and the Federal Supreme Court ought not to "sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way."

Finally, Taney returned to the question of jurisdiction as based upon citizenship, and held that, "upon the whole, therefore, it is the judgment of this court that it

[61] Mr. Justice Brown in Downs v. Bidwell, 182 U. S. Reps. 244–292, said that Taney was wrong.

[62] 10 Howard 82.

[63] The only reference to her.

appears, by the record before us, that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment on it."

The Chief Justice's whole argument is labored and unsatisfactory, and in the phrase of Martin Luther, it is a "right strawy" opinion.

II. THE OPINIONS OF THE OTHER JUDGES

In most cases, it has been sufficient to give Taney's opinion, but here we must summarize all the opinions, to give the full account of the cause. Justice Wayne's opinion came second, and occupied only four pages. He thought that "the case involves private rights of value and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision," in other words, the Court must settle a political question. This sentence shows us the union-loving Georgian slaveholder, who largely caused the Court's opinion to take so wide a scope. He must have revised his opinion after the case was decided, for he wrote: "It has been assumed that this court has acted extra-judicially, in giving an opinion" upon the Missouri Compromise, since the Supreme Court must decide whether it has jurisdiction to "review the case from the State Court, and, if it shall be found that it has not, the case is at an end, so far as this Court is concerned." In the case which comes up from a Circuit Court, however, "we begin a review of it, not by inquiring if this Court has jurisdiction, but if that Court has it." Other-

wise, the Circuit Court jurisdiction would be enlarged, and the Supreme Court could only review the lower Court's judgment. He concurred with Taney and Nelson.

Nelson's opinion came next, and occupied nine pages. It will be remembered that it was originally intended as the Court's opinion, and that Nelson refused to alter it.[64] He held that, "except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction. . . . . Whether, therefore, the State of Missouri will recognize, or give effect to, the laws of Illinois within her territory, on the subject of slavery, is a question for her to determine. . . . Our conclusion is, in this branch of the case, that the question involved is one, depending solely upon the law of Missouri, and that the Federal Court, sitting in the State and trying the case before us, was bound to follow it." The decisions of the Missouri Court in this case,[65] "must be admitted as the settled law of the State," and, consequently, as "conclusive of the case in this court." By these decisions, Scott remains a slave. Previous decisions in Missouri truly were different, but the "first decision of a principle of law by a State Court" is not to be regarded as "permanent and irrevocable." "What court," asks Nelson, unaware that Lincoln and other anti-slavery men shall ask a similar question concerning the Supreme Court's decision in this case, "has not changed its opinions? What judge has not changed?" Most of the previous cases, moreover, in

[64] See Tyler, p. 385. Rhodes, II, p. 253, wrote, if Nelson's opinion had been filed alone, the "case would have excited little interest at the time, and would hardly have demanded more than the briefest notice from the historian."

[65] 15 Mo. Rep. 576, 595, 17 Mo. Rep. 434.

the border slave States, agree with the Missouri Supreme Court's decision in the Dred Scott Case.

Dr. Emerson went to his post as an officer in the United States army "for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode." A citizen of the United States, who is a slave holder, has a "right of transit into, or through a free State, on business, or commercial pursuits," or in the exercise of "Federal rights, or the discharge of a Federal duty,"—a right depending on the Constitution of the United States and different from the right of a settler.

Justice Grier, the only member of the Court from a Free State, to concur with Taney's opinion, concurring also with Nelson, took two short paragraphs to state these facts. He had told Buchanan he would file no full opinion, and he did not change his purpose.

Justice Daniel occupied twenty-four pages, emphasizing the importance of the case, and giving an elaborate and inaccurate account of slavery and Roman Law.

Justice Campbell's opinion is twenty-five pages in length, and includes a discussion of historical questions, in the course of which, he likens the position of the coalheavers and salters in England at the time of the Revolution, to that of the negro slaves in North America.

Justice Catron, in an opinion of ten pages, took the rather remarkable position that, since Scott won the demurrer in the Circuit Court and Sanford the decision on the merits of the case, neither could appeal. He discussed the Treaty, by which Louisiana had been ceded, and said the Missouri Compromise Act was void, through violating it.

Seven judges held that Scott should remain a slave. Two dissented, and maintained that he was a freedman.

McLean, of Ohio, the senior of these, had been long upon the Bench, and was supposed to have held ambitions to receive the nomination for the Presidency by the new Republican party in the recent campaign. His opinion covers thirty-five pages. If Nelson gave aid and comfort to those who hoped for a change in the rulings of the Court, McLean surely used words which were almost as extreme as any spoken upon the stump by an anti-slavery orator. No more uncompromising dissent was ever filed. The statement of Taney, that, if the Court looking at the record, sees the Circuit Court had no jurisdiction, there is ground for dismissal, "maybe characterized as rather a sharp practice and one which seldom, if ever, occurs." McLean is very severe upon Taney's opinion on this point; in which no case was cited as authority, nor, "it is believed, can be cited." He blamed Taney's countenance of the practice of some States which permitted foreigners to enjoy political privileges, and maintained that any freeman is a citizen within the act of Congress and entitled to sue in the Federal Courts. Taney contended that a "colored citizen would not be an agreeable member of society," and McLean shrewdly replied that "this is more a matter of taste than of law."

Slavery is a local State institution, existing only in a country where it has been established, and a slave carried beyond that territory can not be reclaimed. In the dark ages, white men were slaves. Slavery is not a status peculiar to negroes.

Marshall,[66] had determined that Congress possessed power to legislate for the territories. To provide for the government of lands annexed to the country is an

[66] Atlantic Ins. Co. v. Canter, 1 Peters, 511.

"implied power, essential to the acquisition of new territory."

McLean flamed out with indignation, and, in language remote from the usual calm tones of judicial decisions, he exclaimed: "To discover, at this late date, that the lawmaking powers had united with the judiciary to usurp a jurisdiction which did not belong to them," is "more extraordinary than anything which has occurred in the judicial history of this, or any other country." An "acquiescence under a settled construction of the constitution, for sixty years, although it may be erroneous," is better than to overturn it.

McLean referred to the law of 1804, which prohibited the introduction of slaves into Orleans Territory from other parts of the Union and maintained that, if Congress may establish a Territorial Government, the Court cannot control that discretion as to the details of the government.

Prigg v. Pennsylvania proved that a slave brought into a free State becomes free. If slavery should exist in a territory, under the laws of which of the Slave States should it be administered? This is a question which the pro-slavery men never tried to answer—they could not answer it successfully.

McLean then formally defied the opinion just delivered by the Chief Justice:

> In this case, a majority of the Court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse or any other kind of property. It is true this was said by the Court, as also many other things which are of no authority. Nothing that has been said by them which has not a direct bearing on the jurisdiction of the Court, against which they decided, can be considered as authority. I shall certainly not regard it as such.

How could one expect the people to respect the decision, when a member of the Court publicly announced that he would not do so?

Curiously enough, McLean made no reference to his own opinion in the case of Menard v. Aspasia,[67] in which he had spoken for the Court, and had held that it had no jurisdiction, on an appeal from the Missouri Supreme Court, which opinion held that a negro who had been taken to Illinois and had returned to Missouri, had become free under the terms of the Ordinance of 1787. He did not show that Taney's language as to the decisions of the Missouri Court was far too strong, by citing five cases, from 1824 to 1840, in which the Supreme Court of that State had declared negroes free, whose cases had been similar to that of Scott, and that even in the case of Scott, the decision had been made by two justices only, while the third dissented.[68]

In his conclusion, McLean quoted from Grier's opinion for the Court in Pease v. Peck, decided in the preceding term of Court:[69] "When the decisions of the

[67] 5 Peters 504.

[68] (1) Winey v. Whitefield, 1 Mo. 473, Slave from N. C. to Ill. for three or four years then to Mo.—free; (2) La Grange v. Chouteau, 2 Mo. 20. The Ordinance of 1787 upheld and residence in the Northwest Territory entitled the slave to freedom; (3) Julia v. McKinney, 3 Mo. 279, Slave hired out to work in Illinois became free; (4) Rachel v. Walker, 4 Mo. 350, Slave brought by Army officer taken to Ft. Snelling, and then to Prairie du Chien, and returned to Missouri, became free—striking parallel to Dred Scott case (Blair cited this case in his brief on Scott) (5) Wilson v. Melvin, 5 Mo. 592, Negro taken from Tennessee to Illinois, and then brought to Missouri, is free. McLean noted that Gamble C. J. was the dissentient in 15 Missouri. Smith "Parties and Slavery, "p. 202, uses a mild word in speaking of McLean's argument as "vigorous." Farrar in 85 North Am. Rev., p. 407, wrote concerning Scott's residence in Illinois: "If neither the Constitution of the United States, nor the Constitution of the States can protect personal freedom; no man, whether white or black (for the Constitution makes no difference) has any guaranty of protection by the strong arm of the law."

[69] 18 Howard 589.

State Court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions and much more is this the case, when, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent." After this quotation, McLean tartly said that these words "do not seem to be as fresh in the recollection of some of my brethren as in my own."

Justice Curtis's dissent, the last of the opinions, covers nearly seventy pages, and was his swan song, for he resigned before the next term of Court. It has been well said[70] that "by complete logical argument" this opinion "refutes every one of Taney's points" and that, "as an exposition of the Federal conception of the nature of the government and the powers of Congress," it "was a masterpiece."[71]

Curtis admitted, in the outset, that the Supreme Court could decide upon the question of jurisdiction and that Sanford did not lose the right to have the matter discussed, by assigning error on the record, because he won the case below; since on a writ of error, the whole record is open for inspection in the Supreme Court. The true question, to Curtis's mind, was whether the Supreme Court would affirm, or revise, the judgment of the Circuit Court on the merits, when the record showed upon a plea to the jurisdiction, that the case was one to which the judicial power of the United States did not extend. Curtis answered the

[70] Smith "Parties and Slavery," p. 202.

[71] Cf. Rhodes, II, 263. Ex-President Fillmore wrote Curtis that his argument was unanswerable. Tyler, p. 363, attacked Curtis's doctrine that slavery was created by municipal law and maintained that it was created by the law of nations.

question affirmatively, and said that the Court on its own motion might so act.

In a very learned fashion, he then discussed citizenship, but did not define it. The citizens of the several States were citizens of the United States under the Articles of Confederation. Judge Gaston[72] in 1838, had said in North Carolina, while delivering an opinion for the highest court of that State, that all human beings were either slaves, aliens, or citizens. Massachusetts, New Hampshire, New York, and New Jersey all had negro citizens, entitled to vote before 1787. "My own opinion is," added Curtis, "that a calm comparison of these assertions of universal, abstract truths, and of their own individual opinions and acts would not leave" the men of those States "under any reproach of inconsistency. . . . . But this is not the place to vindicate their memory." The Constitution, *proprio vigore*, does not deprive of citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native born citizens of any State after its adoption. When the Constitution uses the phrase, "native born citizen," it implies that citizenship comes from birth. In five States, at least, colored men could vote, at the time of the adoption of the United States Constitution.[73] "The only power given to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth. There is no reference in the Constitution to any native born persons who should derive their citizenship in the United States from the action of the Federal Government." The enjoyment of the elective franchise is not essential to citizenship. A naturalized male citizen

[72] State v. Manuel, 4 Dev. and Bat. 24. Blair cited this case.

[73] Maryland was a sixth.

may not become President; yet he is a citizen. Citizenship is not dependent upon the possession of any particular political or civil rights. "It rests with the States themselves so to frame their Constitutions and laws, as not to attach a particular privilege, or immunity, to mere naked citizenship." Under the Confederation, the term "free inhabitants" was used as equivalent for "citizens."

A master may not emancipate a slave and make him a citizen thereby, without the approval of the State. The treaties with the Choctaws and Chickasaws and that with Mexico at Guadalupe Hidalgo, had made colored persons citizens.

The plea to the jurisdiction was bad, according to Curtis's view. He dissented from the "assumption of authority" to examine the constitutionality of the Missouri Compromise Act. Such an exertion of judicial power transcends the limits of the authority of the Court.[74]

Curtis considered that the Circuit Court had jurisdiction, and, consequently, he must consider whether its decisions should be reversed. He therefore inquired: (1) What was the law of the territory into which Scott went? and (2) Did the State of Missouri recognize that law, on the return of Scott?

As to the first question, Curtis wrote that the will of states and nations, by whose municipal law slavery is not recognized, has been manifested either (a) absolutely to dissolve the relation of master and slave, (b) to refuse the master aid to exercise control over the slave, or (c) to distinguish between the case of a master and slave temporarily in the country *animo non manendi*,

[74] He cited La Grand v. Darnall, 2 Peters 664, and Livingston v. Story, 11 Peters 351.

and that of those residing there permanently. If the Acts of Congress are valid, the law of the Territory, within whose limits Scott and his family resided, fell under the first category, and operated directly upon the status of the slave, changing it to freedom. By extending the Laws of Michigan, to the Territory of Wisconsin, in which Fort Snelling was located, when Scott lived there, Congress not only borrowed a "general system of municipal law," which "did not tolerate slavery," but it was "positively enacted that slavery" should not exist there.

Curtis then inquires whether the law of Missouri recognized the "change wrought in the status of Scott by the operation of the Wisconsin laws"? "In the absence of positive law to the contrary," he answered, "the will of every civilized State must be presumed to allow such effect to foreign laws, as is in accordance with the settled rules of international law. . . . . It is the comity of the State, not of the Court." The judges' "duty is simply to ascertain and give effect to this will." Missouri, neither by statute, nor by customary law, (which was the Common Law introduced in 1816), "had manifested its will to displace any rule of international law applicable to a change in the status of a slave by foreign law." International law declares that the status of any person must be determined by the law of that country, "which has next previously, rightfully, operated on and fixed that status."

A military officer's domicile may be his residence. He is not incapable of acquiring one, and the presumption is that a two years' sojourn would establish a residence. Scott's domicile must have been that of Dr. Emerson, who "went into the territory to discharge his duty to the United States." Over him, "all valid

laws of the United States, constitutionally enacted by Congress for the government of the territory, rightfully extended." If those laws were constitutional, Scott and his wife were capable of contracting a lawful marriage, and were "absolutely free persons." A marriage valid by law of the place where it was contracted is valid everywhere. If Scott and his wife were slaves, three was no valid marriage, and the children were illegitimate. "In my judgment," Curtis announced, "there can be no more effectual abandonment of the legal rights of a master over his slave, than by the consent of the master that the slave should enter into a contract of marriage in a free State." A law in Missouri which would annul a marriage lawfully contracted in Wisconsin would impair the obligation of a contract, and, accordingly, would be unconstitutional. The decision in the Missouri Supreme Court as to Scott, did not settle the question of his domicile, but broadly denied the operation in Missouri of the law of any foreign State, or country, upon the status of a slave going into Missouri from such foreign State, the laws of which country had acted directly upon his status, changing it from slave to free. This decision was wrong, and was in conflict with previous decisions of that Court, with a great weight of judicial authority in other slave-holding States, and with the fundamental principles of private international law. The Supreme Court is not bound to follow it, but has the rightful authority, finally, to decide the effect of valid laws on the status of Scott in Wisconsin, and as to whether the Missouri law, as interpreted in the decision, impaired the obligation of a contract.

The fact that the suit in the Missouri Court was abandoned, and a new suit was begun in the Federal

Courts, had so little weight that the Court had not considered a similar point sufficiently important to notice in its opinion in a recent case,[75] although its attention had been called to the matter in the argument. (Like McLean, he cited Pease v. Peck to show that the last decision of the State Court need not be taken.)

He next approached the validity of the Missouri Compromise Act. It depended on the power of Congress over the territories. The cessions of territory by the States to the Federal Government conceded jurisdiction, as well as soil. In 1787, while the Constitutional Convention was sitting at Philadelphia, the Confederation Congress, meeting in New York City, passed the North West Territory Ordinance on July 13, and it was known to the Convention that this stretch of the powers of the Confederation was made by necessity. Clearly, the Convention would not have neglected, at that moment, to have given the Federal Government under the Constitution all necessary powers of legislation over the territories. The term "Territory of the United States" did not describe an "abstraction," but an "actual subject matter, and not alone" the lands "actually belonging to the United States, for cessions from North Carolina and Georgia were contemplated." It is now far too late to question the validity of annexations of new territory to the United States, and the only way by which the Federal Government possesses the power of governing such annexed lands, is under the territory clause. To take a clause, "the language of which is broad enough to extend throughout the existence of the government, ... and narrow it down to territory belonging to the United States when the Constitution was framed, while, at the same time,

[75] Horner v. Benson, 16 Howard 354.

it is admitted that the Constitution contemplated and authorized the acquisition. . . . of other and foreign territory," was as "inconsistent with the nature and purposes of the instrument, as it is with its language." The rules and regulations made by Congress can be nothing but laws. The limits of these rules are those of the "express prohibitions on Congress." The regulations must be "needful,"—a political and not a judicial question, to be decided by Congress. The Federal Government possesses the "power to govern the inhabitants of the Territory by such laws as Congress deems needful, until they obtain admission as States." Slavery is not excluded from the Congressional power, which extends to "all needful rules." "The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance, or the prohibition of slavery comes within the known and recognized scope of that purpose and object," Curtis contined, saying that a "practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and, in doubtful cases, should determine the judicial mind on a question of the interpretation of the Constitution." Applying this principle, he noted that Congress in 1789 adopted as a law the Ordinance for the government of the Northwest Territory, fourteen members of the Constitutional Convention, including James Madison, being members of the Congress. Congress acted favorably, or unfavorably, as to slavery in the cases of the North Carolina Cession, and in the cases of the Territories of Mississippi, Indiana, Michigan, Illinois, Wisconsin, Iowa, and Oregon. In the Missouri Compromise Act, Congress refused to

interfere with slavery in Louisiana, and in the territories of Orleans, Missouri, and Florida. Curtis found eight instances from 1789 to 1848, in which Congress had excluded and six more (the last being in 1822), when it recognized and continued slavery. Every President, who was in public life when the Constitution was adopted, had signed one of those acts.

The view that the Constitution secures every slaveholder an indefeasible right to hold slaves in the territory, was drawn from property rights, and from the claim that exclusion of slaves made an unjust discrimination. The Court had no concern with the weight of these considerations, which could not engraft anything upon the Constitution. "To allow this to be done . . . ., upon reasons purely political, renders its interpretation impossible, because judicial tribunals as such cannot decide upon political considerations." Taney had often expressed this sentiment, but here had departed from it. "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned," Curtis continued, "and theoretical opinions of individuals are allowed to control its meaning, we no longer have a Constitution,—we are under the government of individual men," and, "in place of a Republican government, with limited and defined powers, we have government which is merely an exponent of the individual political opinions of the members of the Court. Where the Constitution has said all needful rules and regulations" as to the territory may be made by Congress, Curtis "must find something more than theoretical reasoning to induce me to say it did not mean all."[76]

[76] He cited Loughborough v. Blake, 5 Wheaton, and the decision in 9 Wheaton as to the embargo, to support his position.

The only clause in the Constitution suggested as a reason for declaring the Missouri Compromise unconstitutional, was the fifth Amendment, to the effect that property should only be taken by due process of law. Curtis replied to this citation; that (1) "slavery, being contrary to natural right," is created only by municipal law;[77] that (2) the "master is subject to the supreme power of the state whose will controls his action toward his slave and this control must be defined and regulated by the municipal law;" and (3) that "not only must the status of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that status, must be defined, protected, and enforced by such law." Curtis then puts this question to the advocates of slavery: "Is it conceivable that the Constitution has conferred the right on every citizen to become a resident of the territory of the United States with his slaves, and there to hold them as such, but has neither made, nor provided any municipal regulations which are essential to the existence of slavery? If a citizen of a slaveholding State may bring slaves into this territory, why may not a citizen of a non-slaveholding State do so? and "what law of slavery does either take with him to the Territory?" If the reply should be the law of the State whence the slave came, Curtis would explain: "What an anomaly is this! Where else can we find, under the law of any civilized country, the power to introduce, and permenently continue, diverse systems of foreign municipal law, for holding persons in slavery!" Curtis shows that "The offspring of the female must be governed by the foreign municipal law to which the mother was subject, and that, when any slave is sold or passes by succession

[77] Cf. Prigg v. Pa.

on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved the status of a slave before his exportation." Such a condition would "prove to be as unpracticable in fact, as it is . . . . monstrous in theory."

The territory ceded by France, was acquired for the equal benefit of *all* the citizens, of the United States, "in their collective, not their individual capacities, ... according to the best judgment and discretion of the Congress. . . . . Whatever individual claims may be founded on local circumstances or sectional differences of condition, can not . . . . be recognized in this court, without arrogating to the judicial branch of the Government, powers not committed to it, and which" it is not "fitted to wield." If the phrase, "due process of law," was violated by Congress in 1820, it was also violated in 1787, but no one discovered it. Maryland and Virginia had forbidden the importation of slaves, without being supposed to violate the Constitution. If Congress had power to prohibit slavery at all, the use of the word "forever" in the act would not invalidate the law, for the word only means until the act is repealed. The treaty of cession of Louisiana cannot "deprive the Congress of any part of the legislative power conferred by the Constitution." A stipulation in a treaty as to legislation had repeatedly been held in the Supreme Court "to address itself to the political or legislative power, by whose action thereon this Court is bound." That treaty, however, contains no provision limiting Congressional power, and the Missouri Compromise territory was a "wilderness inhabited by savages" in 1803. A

clause in the treaty, protecting the individual rights of the inhabitants of Louisiana, did not preclude Congress from excluding slavery from uninhabited territory. Curtis ended by saying: "I have touched no question, which, in the view I have taken, it was not absolutely necessary for me to pass upon," and have avoided no question. "To have done either more or less would have been inconsistent with my views of my duty."

No one has given a more serious view of the importance of the Dred Scott Case than B. R. Curtis, Jr., in his life of his father, Mr. Justice Curtis.[78] He maintains that there was no proper judicial majority "upon the question of the power of Congress to prohibit slavery in a Territory, and, consequently, the claim that a 'decision' adverse to that power had been made by the Supreme Court, was erroneous." He insists that the "course of a majority of the judges . . . . precipitated the action of causes which produced our Civil War." "Southern secession would never have been attempted without such excitement as was occasioned by what was *claimed* to be a decision of the Supreme Court" concerning slavery in the territories. Without this decision, Southern feeling concerning the carrying of slaves into a territory "must have died a natural death. . . . . It was the factitious importance given to the supposed constitutional rights of such extension by the venerable persons composing the majority of the Supreme Court, that awakened anew a jealousy which had already subsided under the tranquillizing influences" of the Compromise of 1850. There was a general feeling throughout the North, that the annulling of the Missouri Compromise Act was

[78] Life of Curtis, I, 195 to 197. See Hampton L. Carson's "Great Dissenting Opinions" in Proceedings of Am. Bar Ass. for 1894, p., 284.

"made from political motives." The majority judges failed to prevent such an idea, by combining their views, or of disposing otherwise of the case. The filing of separate opinions made people think that much was said *obiter*, and that there was something wrong. Confidence in the Court was impaired by the decision, and the majority of lawyers in the North rejected it.

By a vote of seven to two (McLean and Curtis), the Court had held that Scott was a slave. Three of the justices, (Taney, Wayne and Daniel) had said that no descendant of a slave could be a citizen, and one (Curtis) had dissented from that view. Four, and possibly five, justices (Taney, Wayne, Daniel, Curtis, and possibly Grier), had decided that the plea in abatement and the whole judgment of the Court below were before the Court on the record,[79] two had denied this (Catron and McLean), and two (Nelson and Campbell) expressed no opinion in the matter. Nelson rested his entire opinion on reaffirming the decision of the Circuit Court, and five, including Taney, concurred with him. Four justices out of nine held the Missouri Compromise Act unconstitutional, (Taney, Wayne, Grier and Catron).[80] The confused condition of affairs clearly appears in these combinations.

On the seventh of March the Court delivered its opinion in accordance to the forecast, and on the next day, Pike wrote the *Tribune*:[81]

> The slavery question has, at length, found its way into the Supreme Court . . . . and that body has fully justified all predictions and all anticipations that the system would find therein a home and a bulwark. . . . . Alas! that the character

[79] Corwin, p. 134, placed Campbell here instead of Grier.

[80] See Farrar in 85 North Am. Rev. 392, and McMaster, VIII, 280. The latter speaks of the majority of the Court as "laying aside decorum and usage."

[81] "First Blows," p. 367.

of the Supreme Court of the United States as a judicial body has gone! It has abdicated its just functions and descended into the political arena.

Pike praised the dissenting justices and bitterly insisted that the decision "must be temporary." The court's appearance, while performing this "atrocious" and unnecessary action, was that of "nervous exaltation." Taney, "the cunning chief, had led the van, and, plank by plank, laid down a platform of historical falsehood and gross assumption."

These hot and passionate words were uttered by a man, in whom reflection wrought no change of mind, and, on March 23, he wrote the *Tribune*, in answering the question: "What are we doing to do about the decision?" "We propose to revolutionize the revolution," and "strike directly at slavery."[82] The State of Missouri gave official approval by naming a County after Taney. Its county seat, Taneyville, is the only post office in the United States named for the Chief Justice, for Taneytown, in Maryland, took its name from one of his relatives.[83]

Alexander H. Stephens, speaking in the House of Representatives, on May 1, 1857,[84] accepted the decision, as proving that Minnesota could confer upon persons who were not citizens of the United States, the right to vote for members of the Legislature and for Congressmen, without violating the Federal Constitution. Taney had admitted that the States could confer upon negroes the privilege of suffrage within their own limits, without making them citizens of the United

[82] "First Blows," p. 370.

[83] 2 Md. Hist. Mag. 74.

[84] Johnston and Browne's Stephens p. 335.

States. There could scarcely have been a more perfect *reductio ad absurdum* of Taney's opinion.

Two years subsequently, Stephens[85] said that on the principle of the Dred Scott decision depended, "in all probability, the destiny of this country, and who is vain enough to suppose that the Dred Scott decision would have been made, but for the agitation and discussion that preceded it, and the sound, clear principles which that discussion brought to light?"

Buchanan stood firmly behind the opinion[86] but was forced to say in his message to Congress of December 3, 1860, after stating that emancipation is an "act of sovereign authority and not of subordinate territorial legislation,"[87] that, in spite of the Supreme Court's action, "such has been the factious temper of the times, that the correctness of this decision has been extensively impugned before the people, and the question has given rise to angry political conflicts throughout the country."

Reverdy Johnson always insisted that the decision was correct, and yet continued to believe in squatter sovereignty, maintaining that the decision had not forbidden the settlers to abolish slavery.[88]

Stephen A. Douglas was forced to defend the decision so feebly in Illinois, in order to defeat Lincoln in the canvass for the United States Senate in 1858, that the South refused to support him for the Presidency in 1860.

[85] On August 2, 1859, Life by Cleveland, p. 644, quoted in Von Holst Const. Hist. of U. S., VI, p. 45.

[86] See his veto messages of Feb. 24, 1859, on the bill donating public lands, and of June 22, 1860, on the homestead bill, (Works, X, pp. 351 and 443), and letter of 1865, on the nullification of the Dred Scott decision by Congressional Act of June 19, 1862, which destroyed slavery in the territories, Works, XII, 37.

[87] Works, XII, 101.

[88] Tyler, 385, Steiner's "Life of Johnson," p. 38.

A writer in the *National Quarterly Review* for December, 1864,[89] defended the Dred Scott decision, as legal, not political. It was impossible to suggest any other ground for slavery, "that is intrinsically more reasonable, or plausible, than that of Taney"—which is surely damning it with faint praise.

Tyler, in his life of Taney, published in 1872, devoted thirty pages to the defence of Taney's opinion. With indiscriminate praise, Mikell, as late as 1908, wrote that[90] Taney's opinion was "unassailable in the logic with which it declared unconstitutional the aim and purpose of the Republican party."[91]

E. W. R. Ewing wrote a volume which appeared in 1909, entitled the "Legal and Historical Status of the Dred Scott Decision," which warmly defended it. Other than these, there have been few important defences made.

Taney found opportunity to write three arguments in support of his opinion. The first of these was written on August 19, 1857, from the Fauquier White Sulphur Springs, where he was spending a vacation, and was addressed to President Eliphalet Nott of Union College, Schenectady, New York. The venerable educator had recently written a work entitled "Slavery and the Remedy," with a Review of the Decision of the Supreme Court in the Case of Dred Scott, and had sent Taney a copy.[92] Taney had been "much out of health" and had delayed to acknowledge the work, which he had

[89] Vol. X, p. 60.

[90] 4 "Gt. Am. Lawyers," p. 162.

[91] He speaks of the "gratuitous misrepresentation" and the "vituperation of partisan abuse" from which Taney suffered.

[92] Taney's reply was presented to the Mass. Hist. Soc. by Robert C. Winthrop in March, 1873, and is printed in the Proceedings of the Society, 1871–73, at p. 445.

read with much pleasure, because of its impartial and friendly spirit." Nott's review of the Dred Scott case appeared to Taney to be a "fair one," stating "truly its portion." Taney hoped that Nott's work would correct "misinterpretation." He did not mean to publish a vindication of the opinion. "It would not become a member of the Supreme Court" to go outside of the "appropriate sphere of judicial proceedings." "The opinion must be left to speak for itself." Taney had never met Nott, and asked that he do not publish the letter. "I am not a slaveholder," Taney added, "More than thirty years ago, I manumitted every slave I ever owned, except two, who were too old when they became my property. These two, I supported in comfort, as long as they lived. And I am glad to say that none of those whom I manumitted disappointed my expectations, but have shown, by their conduct, that they were worthy of freedom and knew how to use it."

The letter is important from its disclosure of Taney's personal attitude towards slavery. He wrote:

> Every intelligent person, whose life has been passed in a slaveholding State, and who has carefully observed the character and capacity of the African race, will see that a general and sudden emancipation would be absolute ruin to the negroes, as well as to the white people. In Maryland, and Virginia, every facility has been given to emancipation, where the freed person was of an age and condition of health that would enable him to provide for himself by his own labor. . . . . Manumissions were frequent, and numerous; they sprang from kindness and sympathy of the master for the negroes, from scruples, and were often made without sufficiently considering his ability and fitness for freedom. And in the greater number of cases that have come under my observation, freedom has been a serious misfortune to the manumitted slave, and he has most commonly brought upon himself privations and sufferings which he would not have been called upon to endure

in a state of slavery. In many cases, however, it has undoubtedly promoted his happiness.

It is difficult for any one who has not lived in a slaveholding State to comprehend the relations which practically exist between the slaves and their masters. They are, in general, kind on both sides, unless the slave is tampered with by ill-disposed persons, and his life is usually cheerful and contented, and free from any distressing wants, or anxieties. He is well taken care of in infancy, in sickness, and in old age."

Taney admitted that there were exceptions, as "will always be the case where power combined with bad passions, or a mercenary spirit, is on one side, and weakness on the other."

"Unquestionably," he continued, "it is the duty of every master to watch over the religious and moral culture of his slaves, and to give them every comfort and privilege that is not inconsistent with the continued existence of the relations between them." Most of the "hereditary slaveholders" in Maryland and Virginia do this.

Taney believed that it had "been the desire of every statesman in Maryland to secure to the slave every protection from maltreatment by the master that can, with safety, be given, and, without impairing that degree of authority which is essential to the "interest and well being of both." This is a "delicate question," to be "approached with the utmost caution," and had been made more difficult, because of the abolitionists' attempt to "produce discontent and ill feeling in the subject race." The result was that the master became "more sensitive and jealous of any new restriction upon the power he had heretofore exercised," fearing that any step in that direction "might injuriously affect the minds of the slaves. They are, for the most part weak, credulous, and easily misled by stronger minds."

"If the slaves now receive more privileges," they would, probably, be told that they were wrung from their master by their Northern friends and be taught to regard them as the first step to a speedy and universal emancipation, placing them on a perfect equality with the white race. It is easy to foresee what would be the sad result of such an impression upon the minds of this weak and credulous race." No statement could show Taney's mind upon the subject more clearly, nor more thoroughly display the essential evils of slaveholding, as expounded by one of the most enlightened and moderate of its advocates.

A few days later, on August 29, 1857, Taney wrote from the same place to ex-President Pierce concerning the Dred Scott Case:

> You see, I am passing through another conflict, much like the one which followed the removal of the Deposites and the war is waged upon me with the same spirit and by many of the same men, who distinguished themselves on that occasion by the unscrupulous means to which they resorted. . . . . At my time of life,[93] when my end must be near, I should have rejoiced to find that the irritating strifes of this world were over, and that I was about to depart in peace with all men; and all men in peace with me; yet perhaps it is best as it is! The mind is less apt to feel the torpor of age, when it is thus forced into action by public duties, and I have an abiding confidence that this act of my judicial life will stand the test of time and the sober judgment of the country, as well as the political act of which I have spoke. Your successor has, I think, a difficult time before him. Symptoms of discord are already appearing. Feeling, as I do, the necessity of cordial union among the friends of the Constitution, in order to prevent the government from falling to pieces, I am unwilling to find fault with the present administration, even when I cannot approve.

[93] Letter is in Library of Congress and is printed in 10 Am. Hist. Rev. 358. Taney expected to return to Washington about September 15 or 20.

Yet I must say to you that I deeply regret the adoption of the principle of rotation in office. Its inevitable consequences will be to multiply the number of political adventurers and trading politicians, who are always ready to sacrifice the public interests for their own individual profit, and our elections, instead of being contests for principles, will, in a short time become contests for the emoluments of office, and be influenced by mere mercenary motives. The removal of persons who are opposed to the administration, and seeking to displace it, stands on a very different principle. Indeed, I never could comprehend how a man of right principles and right feelings could consent to hold an office under persons whom he thought it his duty to oppose and was endeavoring to turn out. But the principle adopted by the present administration, is a very different one, is now for the first time brought into the government, and will, I fear, do great mischief.

A year later, in September 1858, while the subject was "fresh" in Taney's mind, he prepared a "statement, in order to prove the truth of the historical fact stated" in his "opinion, in relation to England and the principle decided by the Court," that he might be saved the trouble of further investigation, should the subject of slavery come before the Court again in his lifetime. It is safe to infer that the criticism of this part of the opinion had cut Taney most deeply, and it is curious that it should be so.[94] Taney was fiercely uncompromising in his attitude, and the memorandum would still further have exasperated the anti-slavery men, had it seen the light, at the time when it was written. He first stated "in the case of Dred Scott, the decision is, in express terms, confined to the case of a person of the African race whose ancestors had been brought to this country as slaves." He then proceeded to assert that "the Supreme Court did not decide the case upon the ground

[94] Tyler printed this memorandum for the first time in pp. 578 to 608.

that the slavery of the ancestor affixed a mark of inferiority upon the issue which degraded them below the rank of citizens;" but that the provisions contained in the United States Constitution, "for the security and preservation of individual liberty, and conferring special rights and privileges in certain cases upon citizens of different States, could not fairly be construed to embrace a description or class of persons, whom they regarded as inferior and subordinate to the white race, and, in the order of nature, made subject to their dominion and will, and whom they were accustomed to buy and sell like any other property." To put the matter briefly, Taney's opinion in the Dred Scott case authorized "no distinction between persons of the negro race, whether their ancestors were held in slavery or not."

He next made a long disquisition to prove that he had been correct in his statement as to English law. Studying the transportation of slaves from Africa, he noted that Somers, in 1689, said that "negroes are all merchandise," that the treaty of Utrecht in 1713 granted the assiento of slaves to Great Britain, and that this treaty was confirmed and renewed at various periods down to 1750. English statutes, as late as 1787, classed the slave trade with that in rum, and Great Britain had prevented the colonial prohibition of the Africa slave trade. Of course, all this discussion was absolutely irrelevant to Taney's point, for no one denied that negro slaves were merchandise and the statutes said nothing concerning negro freemen.

Lord Holt, when he said, in Smith v. Brown, that "as soon as a negro comes into England he becomes free," only meant in Taney's view that "it was unlawful to import such property into England," and even Lord Mansfield, in the Somerset case, only went so far as to

maintain that slavery was excluded, as a "matter of policy," because the "introduction of such a race of slaves would be injurious" to the Englishmen's interests,

Then Taney turned to the colonists, and maintained that their opinions were not "more favorable to the rights of the African race than those of the mother country." He made many assumptions and we find frequent phrases such as "must have been." He proved too much, and maintained successfully, of course, that the high-sounding words of the Declaration of Independence did not emancipate slaves and that the framers of this document "intended to preserve their ancient and established rights and privileges, and not to upturn their own social institutions and domestic relations." He confuses the social and legal sides of the relation of the races, and states, with perfect truth, as if it tended to prove that a negro could not be a citizen, that there was not a State "in which the intermarriage of a white person with a negro is not still deemed to be unnatural."

He next refers to three American cases, not alluded to in his opinion. The first of these is the Pennsylvania one of Hobbs v. Fogg, decided in 1837, in which the Court held that a free colored man was not such a "freeman" as to be entitled to vote and said that "no colored race was party to our social compact." This case undoubtedly favored the Chief Justice's contention.

The second one was the famous North Carolina one of the State v. Manuel, much relied on in Curtis's dissenting opinion. Taney insisted that Judge Gaston was wrong in this decision. The Revolution was not a mere change of dynasty, nor were all British subjects transformed thereby into American citizens, sharing in the "political body called the State." "Those who

displaced the sovereignty of the English monarch, and associated themselves in a new political body," did not admit negroes thereto, in Taney's view, but he gives no evidence for this unsupported assertion and confused voting with citizenship. White women did not vote, yet assuredly they were citizens.

The third case was Williams v. Ash[95] in which a negro, who sued in the Circuit Court of the United States for the District of Columbia for his freedom, was allowed it. This case Taney wrote merely concerned the jurisdiction of a court under the exclusive right of the Federal Government in the District, and had no reference to the Dred Scott Case.

He closed his memorandum by a general remark that he had seen no criticism of the opinion "that I think it worth while to reply to, for they are founded upon misrepresentations and perversions of the points decided by the Court." If "exposed, they would nevertheless be repeated."[96] On the whole, though the memorandum shows astuteness, and ability as an advocate, it is as well that Taney did not publish it, for it adds little to his reputation as a judge.

An unpleasant consequence of the decision was the friction which occurred between Taney and Curtis. The latter went to Virginia, on the adjournment of Court, after filing his opinion and giving a copy of it to a Boston newspaper man for publication. On his return to Massachusetts, he was told[97] that Taney's opinion had been revised and materially altered. Thereupon,

[95] I Howard 1.

[96] He is especially severe upon a "volume published at Boston, ... which, from the beginning to the end is a disingenuous perversion and misrepresentation of what passed in conference, and also of what the Court has decided." This appears to be a covert attack upon Curtis.

[97] Curtis Life, I, 211 and ff.

he wrote the Clerk of the Court, asking that a copy of that opinion be sent him, as soon as it was printed, and before publication. On April 6, the Clerk answered, refusing to do this, and stating that he acted under Taney's orders. Curtis wrote on April 9, stating that he felt certain that Taney would not have kept the opinion from a fellow-justice and requesting that the Chief Justice be told that Curtis wished the copy. On April 14, the Clerk answered that he had consulted Taney, who reiterated his refusal. Four days later, Curtis addressed Taney a letter, asking him to direct the Clerk to comply with the request. Taney did not respond until April 28, giving his attendance on the Circuit Court as the reason for his delay. He acknowledged having given the order to prevent the publication from being hurried "before the public; in an unusual manner, by irresponsible reporters, through political and partisan newspapers, for political and partisan purposes." A relative of Curtis had asked for a copy of Taney's opinion, that he might publish the two opinions together, and that fact had caused Taney's original refusal. Curtis himself might have a right to a copy, only in case he wished it in aid of the discharge of his judicial duties. Wayne and Daniel approved of Taney's orders. The opinion had "been greatly misunderstood and grossly misrepresented in publications in the newspapers." The Court cannot enter into "discussions with gentlemen who write for the newspapers," but must take care that its opinion be not brought before the public "garbled and mutilated with false glosses."

To this rather discourteous letter, Curtis replied, on May 13, disclaiming any connection with the application of his relative. He did not "think it necessary to

explain to the Clerk of the Court the purpose for which he "wanted a copy of one of its records," though he would have done so to Taney, if such a request had been made by him. He felt that he had a duty to lay before the country his grounds for dissent, and wished to have Taney's opinion, so as to be sure just what it contained. The Court could make no order in vacation time to withhold a paper, without notifying all the judges, which had not been done. Speedy publication of the opinions would prevent the misunderstandings which Taney feared, while the withholding of an "authentic copy" of the opinion could not correct misapprehensions. In Massachusetts and several other States, it was usual to print court opinions in the newspapers.

Taney's next letter was dated June 11. He had received Curtis's epistle before setting out to Richmond to hold Court there, and his duties and "infirm state of health prevented" a prompter reply. He showed great irritation and wished to stop the "unpleasant correspondence" which Curtis had begun. He must, however, correct the "erroneous inferences" which would be drawn from Curtis's letter as to Taney and the "judges with whom I conferred in opinion." Taney asks why Curtis did not ask him directly whether he had "materially altered" his opinion, after it was delivered, and receive a prompt and frank answer. The report, which led Curtis "to ask for the copy," had "no foundation in truth." Taney had not added "one historical fact nor one principle of Constitutional law, nor Common Law, nor Chancery Law, nor Statute Law;" but he admitted that, after hearing the dissenting opinions read, he had added "proofs and authorities to maintain the truth of the historical facts and principles of law asserted by the Court in the opinion delivered

from the Bench." In previous cases, where there had been "political clamor," no complaint had ever been made of keeping back opinions. If Curtis had suggested to the Court an immediate publication, the proposition could have been carefully considered and all the opinions given to the public at once. Instead of taking this step, Curtis wrote Taney, on the day after the case was decided, and before leaving Washington, but said nothing about printing the opinions. By printing his own in the Boston newspaper, he made it impossible to have all the opinions issued together, and caused this to be the first case in which an "assault" upon the decision was "commenced by the publication of the opinion of a dissenting judge." This procedure had encouraged attacks on the judges who gave the decision, by "political partisans, whose prejudices and passions were already enlisted against the constitutional principles affirmed by the Court. The annual elections in several States were approaching; but the judges who concurred in the decision did not "think this state of things would justify the Supreme Court of the United States in assuming the attitude of combatants in the political arena, by publishing its opinion hastily in the public journals." Taney's order to the Clerk prevented this. Curtis published his opinion without consulting the majority of the Court, and, consequently, Taney told him, he had "no just ground upon which" he "could claim to share in the control and disposition of the opinion of the Court, when the avowed object of your dissenting opinion was to impair its authority and to discredit it as a judicial opinion." Taney was very bitter, and closed the letter with this sentence. "If it is your pleasure to address letters to me, charging me with breaches of official duty, justice to myself, as well as to those mem-

bers of the Court with whom I acted, makes it necessary for me to answer and show these charges to be groundless."

The galled jade truly had winced, and Curtis dispatched an answer from Pittsfield on June 16, having read Taney's letter with surprise: "It is certain that the correspondence has become unpleasant, but I do not find, by reviewing it, that it began to be so by any act of mine." Curtis's first letter was written "without expectation that anything unpleasant would grow out of it." He did not charge Taney with "breaches of official duty," though he considered it "highly inexpedient to restrain others from publishing the opinion of the Court. But surely there is a wide difference between differences of opinion on a point like this, and a charge of official misconduct."

Curtis complained of the "assumption that I wanted a copy of the opinion for publication, and not to enable me to discharge an official duty" from doing which the order was a restraint. Taney's admissions showed a "wide field for examination and argument" and gave good ground for wishing to see the document. Taney seemed to charge Curtis with publishing his opinion for "political and partisan purposes." Curtis declined to reply to this, because it was impossible to carry on "such discussion without bitterness." It sufficed him to write that "I have no connection whatever with any political party, and have no political or partisan purpose in view, and no purpose whatever, save a determination to avoid misconstruction and misapprehension." The fact that the publication of the Court's opinion was restrained, or that it was not ready for publication when delivered, did not "authorize any one to impute to me intentional unfairness."

Taney received this letter on June 20, and answered it on the same day, curtly, saying that everything in his letters was "defensive."

This closed the correspondence. Curtis filed the papers with a memorandum that the forty-second rule of the Court was that opinions should, immediately upon the delivery, be delivered to the Clerk for record; but Taney retained his opinion and added to it, what, in Curtis's estimation, amounted to eighteen manuscript pages, without notice to Curtis, so that he might reply to parts of the dissenting opinion. Then he deprived Curtis of the privilege of seeing the Court's opinion, until the official report appeared. When the opinion had been delivered to the Clerk, it became a part of the public records of the country, and any citizen had the right to copy and to publish it. Curtis believed that the opinion was not ready for publication when delivered, and so was not filed, and that the order was to conceal the fact that it was not on file. In any case, the refusal to give Curtis a copy was "an act of usurpation and the reason, which is insinuated, but not stated, that it was conjectured that I wanted it for publication, certainly does not render the act less offensive."

George Ticknor Curtis, who had himself been of counsel in the case, added to this account[98] that Justice Curtis "had as high an appreciation of the judicial character and public service of Chief Justice Taney as any man who ever knew him." The Court had yielded to the "temptation to enter into an expression on constitutional questions, because they were entering into the politics of the time." Taney[99] was a "great magistrate and a man of singular purity of life and

[98] Curtis Life, I, 230.

[99] Curtis Life, I, 239.

character." A "mistake in a judicial career so long, so exalted, and so useful, is only a proof of the imperfection of our nature." The Court's majority made a "fatal mistake," in supposing that the decision could be accepted by the people of the North, and that the "judicial mind of the Free States" could be convinced that a Court could hold that it had no jurisdiction, and, at the same time, could decide constitutional questions arising from the merits of the case.[100] "Nothing that had previously happened had afforded so much excuse for the consolidation of a sectional Northern party in array against the supposed influence of the slave power in national affairs," nor had been "such a godsend to the agitators." "It was the office of statesmen, and not of judges," to try to "promote the peace and harmony" of the country; but, for once, Taney failed to separate political from judicial considerations.

The Dred Scott Case caused Curtis to cease to feel that "confidence in the Supreme Court which was essential to his useful coöperation with its members."[101] He could no longer "expect, on constitutional questions, to see that Court act with that judicial propriety and consistency and the freedom from political considerations which could alone enable it to retain the confidence of the country." Accordingly, he resigned his seat on the Bench, assigning financial affairs as his reason. When he informed Taney of the fact, the latter wrote him, on September 7, 1857, a cold, dry, letter.

> My own experience has long since shown me the inadequacy of the salary attached to the office. At your time of life, you may reasonably expect many years of health, and strength enough for judicial and professional labors. And I have no doubt you have

[100] Curtis Life, I, 207–208.

[101] Curtis Life, I, 243, 247.

judged wisely in returning to the bar, instead of remaining on the bench and diminishing yearly the provision you had made for your family before your appointment.[102]

In May, 1857, Scott and his family were sold to Blow, so that they might be owned and manumitted by a Missourian, and their freedom soon came to them. Scott did not long survive his emancipation, but died of consumption in St. Louis on September 17, 1858.[103]

III. RECEPTION OF THE DECISION THROUGHOUT THE COUNTRY

Vice-President Breckenridge was so pleased with Taney's opinion that he had it printed at his own cost and scattered throughout Kentucky,[104] but, on the other hand, public opinion in Massachusetts was much shocked, and regarded the decision as a purely political

[102] Justice Campbell presided over the meeting of the Bar of the Supreme Court, when Curtis died, and then said that he was not aware that there was "hostility or unkindness felt or expressed" to Curtis by the justices who differed from him. G. T. Curtis, when Campbell died, said that it was not surprising that "judges of Southern birth and training, accustomed to this form of property which lay at the basis of social life in those States, should have overlooked those considerations which made the claim untenable under the Constitution. Certainly, they were bound to follow their convictions, and it seems to me that no impartial person can now examine their opinions as pronounced from the Bench, without seeing that they expressed convictions most sincerely and honestly entertained. Not only did those opinions express convictions honestly and sincerely held; but it was supposed by those learned and upright men that, when the Supreme Court should have affirmed the Constitutional doctrine which they believed to be the true one, all further agitation and controversy would be ended. This was a great mistake, and miscalculation, which the sequal proved." (See H. G. Connor on J. Archibald Campbell in 52 Am. L. Rev. Mch.—Apr. 1918, pp. 184, 187.)

[103] Hill, in Harper's Monthly, for July 1907, p. 252. McMaster, vol. 8, p. 282

[104] Nicolay and Hay's Lincoln, vol. 2, p. 73.

one.[105] The Springfield *Republican* printed an important editorial on the subject on March 11, 1857:[106]

> We can not overrate the significance of the recent opinion of the Supreme Court. . . . . The history of judicial decisions in this country contains nothing so important as this. . . . . The case on which the new opinions were given did not necessarily call for them. It could have been disposed of, without discussing, or disturbing the great principles of slavery which the Court has undertaken to settle. . . . . The majority of the Court therefore rushed needlessly to their conclusions and are justly open to the suspicion of being induced to pronounce them by partisan or sectional influences. The decision was of the utmost importance to the slavery interest, and to the Democratic party as based upon it. They were in desperate circumstances. The present Territories of the country are almost certain to become free States.

The decision "will widen and deepen rather than allay agitation. It will be heeded in practice, only by those who approve of it in theory. The people are the court of last resort in this country. They will discuss and review the action of the Supreme Court and, if it presents itself in a practical question, will vote against it." Merriam, who wrote the editor's life, commented upon the decision, as one "not only against justice and humanity, but also against the traditions and spirit of judicial procedure."

A week later, the *Republican* showed in an editorial the legal weakness of the opinion.[107] "There was but one question before the court, and that was a question

[105] G. T. Curtis to J. J. Crittenden. Coleman's Crittenden, II, p. 137.

[106] Quoted in S. Bowles Memoirs I, p. 222. Ewing "Legal and Hist. Status of the Dred Scott Case," pp. 198 and ff. treats newspaper editorials favoring and opposing the Court's decision.

[107] Merriam's Bowles, I, 223.

concerning its own jurisdiction in the case. In fact, the Court gave no judgment and simply dismissed the case for want of jurisdiction. . . . . Everything beyond this uttered by the Court is just as binding, as if it was uttered by a Southern debating club and no more. It undoubtedly shows how the court will decide in cases involving the questions which it argues and this gives its extra-judicial opinions their only power and significance." No more penetrating attack upon the decision has ever been made than this early one. The fact was that Taney had forgotten the warning in his favorite Maxims of Lord Bacon,[108] that "there is something very flattering to judicial power in the notion that it may restrain legislative power within common right and reason."

Stephen A. Douglas vainly tried to endorse the decision, saying that it was a "barren and worthless power to bring slaves into a territory, unless sustained by appropriate police regulations made by the settlers." Lincoln, in his Springfield speech, on June 26, 1857, made an important utterance upon the matter:[109] "We think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it." His opposition was based upon the fact that the decision was not unanimous, had partisan bias, was based on "assumed historical facts" which were "not really true," and had not been reaffirmed by the Court, so that "it is not resistance, it is not factious, it is not even disrespectful to treat it as not having yet quite established a settled doctrine for the country."

[108] Taney's Decisions, 619.

[109] Works, I, 228. Nicolay and Hay, II, 81.

This is a much milder doctrine than Taney's in regard to the constitutionality of the United States Bank, and it is difficult to see how a man who had accepted the latter could logically object to Lincoln's words.

The North was flaming with indignation. "Far from exercising a healing influence, the decision widened immensely the already serious breach between the North and the South."[110] The New York legislature appointed a joint committee to consider what measures were necessary to protect the rights of her citizens, and upon that committee's report, passed resolutions to the effect that the State would not allow slavery within its borders, and that the Supreme Court, having "identified itself with a sectional and aggressive party" had "impaired the confidence of the people" in the tribunal.[111] The legislatures of Maine and Ohio officially denounced the decision[112] in April, 1857, and Vermont, in November, followed the same course.[113]

Other anti-slavery leaders were even more outspoken than Lincoln. William H. Seward wrote his son, on April 1, 1857,[114] that he had turned his "thoughts to a political programme with a view, if it shall be wise, to bring it out at some time during the season, as a relief and diversion rendered necessary by the Dred Scott Case." He bided his time, and nearly a year later, in a speech delivered in the United States Senate during the debates upon affairs in Kansas, on March 3, 1858,[115] he made a bitter attack upon Taney and the Court, which forgot that its province was *jus dicere* and not

[110] Nicolay and Hay, II, 81.
[111] McMaster, VIII, p. 282.
[112] Ewing "Legal and Hist. Status of the Dred Scott Case," pp. 189, 195.
[113] Ewing, pp. 192, 194.
[114] Seward's Seward, II, 299.
[115] Vide Congressional Globe, Seward's Seward, IV, 574 to 587, Tyler, p. 374.

jus dare, and so had been guilty of judicial usurpation, the "most odious form of tyranny." He charged the decision to "dismiss the action for want of jurisdiction over the suitor's person," as being "as repugnant to the Declaration of Independence and the spirit of the Constitution, as to the instincts of humanity." By that determination, the tribunal had exhausted all its power; but it presumed further to "please the incoming President," by "pronouncing an opinion" that, "by force of the Constitution, slavery existed . . . . in all the territories of the United States, paramount . . . . even to the authority of Congress itself." He accused Buchanan and Taney of conspiracy in the matter, making such grave charges that his biographer, Bancroft, blames him[116] for failing to substantiate, or withdraw his charges. The Senate printed 20,000 copies of this speech, and distributed them. Taney was so enraged by it that he said that had Seward been elected President, he should have refused to administer to him the oath of office.[117]

On March 6, three days after Seward's speech, Reverdy Johnson wrote from Washington[118] a categorical denial of Seward's charges and a flat contradiction of his statements, and, for the most part, Johnson was right.

Charles Sumner was even more intense and persistent than Seward in his attacks upon Taney and the Dred Scott Opinion. In the United States Senate, on July 4, 1862, he said that this judgment of the Supreme Court "must forever stand forth among the inhumanities of this generation," and that the Court "erred infinitely

[116] Life of Seward, I, 448.
[117] Tyler, p. 391.
[118] Tyler, p. 385.

and wretchedly."[119] Nearly two years later, on May 19, 1864, in the Senate Chamber, he returned again to the attack, saying that the "Dred Scott decision was as absurd and irrational as a reversal of the multiplication table, besides shocking the moral sense of mankind." He called it "that atrocious judgment, which was false in law and also false in the history with which it sought to maintain its false law," and as one which "disgraced the country and ought to be expelled from its jurisprudence."[120] John P. Hale, the anti-slavery leader from New Hampshire, made even a fiercer attack, if possible,[121] saying the "Dred Scott decision was an outrage upon the civilization of the age and a libel upon the law, but I do not think it was a disgrace to the Supreme Court of the United States."

Sumner said that the decision, which was nullified by the Act of Congress, passed in 1862, freeing slaves in the Territories, was buried out of sight when, upon his motion, on February 1, 1865, a colored lawyer was admitted to practice before the Supreme Court.[122] After Taney's death, on February 9, 1866, he styled the Dred Scott decision as "perhaps the most thoroughly perverse and reprehensible in judicial history. . . . . It was an insult to conscience, to reason, and to truth."

The first of the more careful studies of the decision, was made by the veteran Jacksonian, Thomas Hart Benton, long United States Senator from Missouri, who having espoused the cause of freedom, wrote his "Historical and Legal Examination of that part of the decision

[119] Works, vol. VII, p. 154.
[120] Works, VIII, p. 237.
[121] Sumner's Works, VIII, 240.
[122] Works, XIII, 337. Speech of Feb. 25, 1870.

of the Supreme Court of the United States in the Dred Scott Case which declares the unconstitutionality of the Missouri Compact and the self extension of the Constitution to the Territories carrying Slavery along with it," completing the work in November, 1857, and learnedly condemning the opinion. He vigorously attacked the declaration that the Missouri Compromise Act was unconstitutional. The decision was "contrary to the uniform action of all the departments of the government." The Court committed a great error[123] in assuming to try such a case; for its power was judicial, not political. The decision was "equivalent to an alteration of the Constitution." If Congress should "look to judicial interpretation for its powers, it would soon cease to have any fixedness to go by." The motives of the Court were laudable, but "the undertaking was beyond its competence." "Far from settling the question, the opinion has become a new question, more virulent than the former, has become the watchword of parties, has gone into party creeds and platforms, bringing the Court itself into the political field, and condemning all future appointments of Federal judges" to the test of their support or rejection of this decision.

He objected to the Court's entrance into the merits of the case, after deciding there was no right to try it through want of jurisdiction, and said that the Court "worked sedulously at building the bridge, long and slender, upon which the majority of the judges crossed the wide and deep gulf which separated the personal rights of Dred Scott and his family from the political rights of the whole body of the American people." "So grave an inquiry," Benton insisted, "going to the

[123] Examination of the Dred Scott Case.

foundations of our government, ought not to be got hold of in that incidental, subaltern, and contingent way." Even if there had been jurisdiction, so "momentous a question" should not "have been hung on it, and tried as appendant to a decision of the personal freedom" of Scott. Especially was this the case, when the consequences to him were the same, whatever might be the fate of the Missouri Compromise. The Court set "out with a fundamental mistake, which pervades its entire opinion and is the parent of its portentous errors. That mistake is in the assumption that the Constitution extends to Territories, as well as to States, and includes these infant settlements in the provisions made for sovereign States." Benton held, and vouched Webster as a supporter, that the Constitution could not be extended over anything except the present States, and new such ones as are admitted into the Union.

Calhoun, in 1848, first advocated the extension of the Constitution to the Territories, and carried his point in the passage of the General Appropriation Bill. The Court now decided that the Constitution went of itself and enforced itself in these Territories, so far as slavery was concerned. Any citizen of any State may carry with him any property, considered such by the laws of nature, into any territory, according to Benton's view, but no man may carry that which is only property by State law, "because he cannot carry with him the law which makes it property." In Virginia, slaves are chattels; in Kentucky, they are real estate, and the "servile code" of each slave State differs from that of every other. "There being no power in Congress, or the Territorial legislature, to legislate upon slavery," according to the Court's opinion, Benton holds that the "whole subject is left to the Constitution and the

State law, that law which cannot cross the State line and that Constitution which gives protection to slave property, but in one instance, and that only in States, not in Territories—the single instance of recovering runaways." The Constitution does not guarantee Republican government to the Territories, and they have not been always so governed. The Federal judiciary does not extend to the Territories. The North West Ordinance, confirmed by a Congressional act passed by Southern votes, freed slaves, "as proprietor and sovereign," and as a "right incidental to ownership and jurisdiction." That act is the "authoritative exemplification and assertion of the power of Congress over the territory, going the whole length of governing a Territory as it pleased, and legislating upon slavery to the extent of the instant and uncompensated emancipation of a great number of slaves," as Benton wrote.[124] "Five times in vain, the inhabitants of Indiana and Illinois petitioned Congress to suspend the anti-slavery clause in the North West Ordinance, and at one attempt in 1806 the unfavorable report of the Congressional Committee was written by John Randolph of Roanoke." North Carolina and Georgia ceded territory to the Nation, with the condition that Congress should not emancipate slaves therein, proving that otherwise this might have been done. In the organization of Mississippi Territory in 1798, Robert Goodloe Harper of South Carolina secured the prohibition of the foreign slave trade, ten years before such prohibition could be made in the States.

When Louisiana was annexed, Randolph spoke of the necessity of "taking possession of this country in the capacity of sovereigns." "The Missouri Compro-

[124] Page 45.

mise was a Southern measure. In the debate thereon strong expressions were used without any rejoinder. For example, John W. Taylor of New York "believed that there was no member . . . . who doubted the constitutional power of Congress to impose such a restriction on the Territories." General Samuel Smith of Maryland "considered the power of Congress over the Territory as supreme, unlimited," and "that Congress could bestow on its Territories any restrictions that it thought proper." In Benton's opinion, the Missouri Compromise saved the Union and became a "national compact," which "good faith and the harmony and stability of the Union deserved to be cherished next after the Constitution." None of its contemporary opponents had stated a Constitutional objection. As late as 1847, Calhoun had voted to extend the Missouri Compromise line to the Pacific Ocean. Reverdy Johnson, Buchanan, and Polk all praised the act, as had Clay and Jefferson Davis. P. R. Barbour and Henry Baldwin, who voted for the act in Congress, were later justices of the Supreme Court. Benton had voted for the confirmation of every one of the sitting justices, except Curtis, and was friendly to the Court; but he believed that[125] "the decisions, being political, are dependent upon moral considerations for their effect. They cannot be enforced. Influence, not authority, is the only power the Court can wield."

John A. Andrew of Massachusetts[126] published an "Analysis of the Dred Scott Case" in which he maintained that the "majority of the Court had no occasion to follow the negroes into the Territory" of Minnesota, because Scott had either been made free by the residence

[125] Page 121.

[126] Vide Nation for April, 1892, p. 311.

in Illinois, or his status depended, as the Court held, not upon the laws of the State of Illinois, where he had been, but upon those of the State of Missouri, where he lived when the suit was brought.[127] In either event, the Missouri Compromise was not relevant to the case.

Among the magazine articles attacking the decision, four stand out as of especial importance. Nathan Hale wrote a very able criticism, which appeared in the *Christian Examiner* for July 1857.[128] Wittily stating that the opinion as issued shows by its pagination that it neither begins nor concludes a volume of reports, he wrote that it may then be discussed as not final. Against Taney's statement of the lack of legal rights of negroes, Hale sets up the counter statement that: "They are a race of men with rights equal to the whites, to which race some individuals are subject." The article is temperate, though decided in tone, hoping that the decision is "*brutum fulmen et inane.*" The North Carolina case of State v. Manuel decided the question of negro citizenship, for "all that any one wishes to establish, is that a man of color may be a citizen of a State," and then he may sue in the United States Courts, if the other party to the suit be a citizen of a different State. In Williams v. Ash,[129] only 14 years before, Taney had recognized that black men could be parties to suits in Federal Courts. Hale admitted that Scott might have remained in slavery, because his master, as an officer of the army, had not acquired a residence in Illinois or Minnesota; but he insisted that Congress, in making rules for a territory,

[127] Gray and Lowell wrote an article upon the case, which was printed in 20 Law Reporter 61.

[128] Vol. 63, p. 65.

[129] I Howard 12.

has nothing to do with the status of persons not inhabitants of the territory, while the Slave States, as a class, do not hold as property the negro race, as a class. A negro is a slave, only because the laws of the State in which he resides declare him to be such, and, in Prigg v. Pennsylvania, the Supreme Court said that slavery was a "mere municipal regulation." There being no such regulation in a territory, how is the slave carried to Kansas to be held,—under the laws of Maryland, or of Texas, or of some other slave State?

In the August number of the *New Englander*, published at New Haven, two Yale professors made notable contributions to the subject, by the articles they wrote for that magazine. President Theodore D. Woolsey dissected Justice Daniel's Roman Law, and showed how faulty it was,[130] while Prof. William A. Larned, of the Department of English, contributed a splendid unsigned article upon "Negro Citizenship." He maintained, at the outset, that the importance of the case was not confined to negroes, but that the opinion had "introduced a mode of interpreting the Constitution," which, "carried to its legitimate results," would render that document an "instrument of oppression to the whites, as well as to the blacks. It has denied the fundamental principles upon which American democracy rests, and which distinguish it from every democracy, ancient or modern, which has ever existed. Besides, it has given the authority of the highest judicial tribunal in the land to all those paltry prejudices against the negroes which are so disgraceful to our countrymen." The article is a carefully reasoned discussion, not an appeal to the feelings.

[130] Vol. 15, p. 345.

Professor Larned[131] examined this question of citizenship. He began with the statement that, at the adoption of the Federal Constitution, there was a body of citizens of the United States, made up entirely of citizens of the States, and that free negroes were citizens of some of these States. "The present body of citizens of the United States is made up, in part, of the descendants of these original citizens, both white and black." Congress has no power to select which citizens of States are to become citizens of the United States, but "each State is to determine what free persons, born within its limits, shall be citizens of such State, and, thereby, citizens of the United States." Otherwise, there would be no protection "from the hazard of a consolidated and arbitrary National Government." The Constitution "superadded" a "general citizenship" to the "particular citizenship of the individual States." Consequently, free negroes, who "constituted a portion of the citizens of the several States," at the time when the Constitution was adopted," constituted also a portion of the people of the United States, and to them, as well as to the other citizens of the States, appertained the immunities and privileges of general citizenship of the United States." Their descendants possess these rights and Larned, rather fancifully, argues that Scott may be one of them. He is on firmer ground, when he calls attention to the fact that Taney ignored the consideration of the question, whether a franchise has been taken away, not whether one has been granted, *de novo*.[132]

The fact that the Federal Government alone can naturalize foreigners does not prove that it can prevent

[131] 15 New Englander 489.

[132] Larned, p. 497, charges Taney with confusing negroes with negro slaves, and with using "unfair statements and appeals to prejudice."

a State from making any native born persons citizens. The burden of proof is on Taney here, and he has not borne it. Whether negroes were citizens of the State in 1787 is a simple "matter of fact, to be deduced from the charters and laws" of those States. To the inference Taney drew from the degradation of the free negro, Larned opposed the fact that free negroes *were* citizens of a majority of the States in 1787.

Taney had referred to the Declaration of Independence as not including free negroes in its statement that "all men" were created free and equal. Larned boldly meets him with the admission that the signers—"these great men, were inconsistent," as are "all great philosophical statesmen, whose views are in advance of the age in which they live, and the circumstances which surround them." Neither Athenian nor Roman governments were founded upon the great truth "which asserts the equality of men as to natural rights. Hence slavery was not inconsistent with the Athenian democracy, or with the Roman republic. But it is the character and glory of the American democracy that it rests on the natural rights of man. Hence, slavery is inconsistent, not with the mere fact that our State governments are democratical, but with the fundamental principle upon which these democracies are founded. . . . . But, in order to be consistent, shall we renounce the very fundamental principles of our government?" The "self evidence" of the truths uttered in the Declaration "is founded upon the common nature of man." Since 1776, Larned thought the change of sentiment as to the blacks had not been favorable to them, as Taney had stated; but, on the contrary, "among the most eminent Southern Statesmen" there had been "a great departure and apostasy from the opinions of the Revolutionary men."

The only negroes referred to in the Federal Constitution are slaves, and of course are not citizens. Whether the people regarded free negroes as having equal rights to themselves or not, in several States they regarded them as entitled to the *one* right of citizenship. Taney was manifestly judging of the slave states of the Revolutionary period, by their condition in 1857, in "the consolidated empire of slavery." Taney magnified the inconveniences of the Southern States from negro citizens of the North. The States did not guard themselves in the Constitution against negro citizens of other States by an express clause, or by implication; consequently, the founders did not have the same fear as Taney.

Larned sums up by saying that, in Taney's opinion, "the reasoning is as weak as the decision is revolting to every just and humane feeling." With such reasoning, the Constitution "can be made to mean anything a dominant party chooses to have it." The decision gives a power to the National Government over the States which "stops not short of reducing the States into mere dependencies of the National Government; . . . . for it depends, according to the decision, upon the National Government alone to determine what citizens of the States shall be selected to constitute the sovereign people of the United States."[133]

Taney never used the term "National Government," always speaking of the "General Government," but there was much truth in what Larned said, of the nationalizing influence of Taney's decisions, which reached their climax, as we shall see, in the decision in the case of Ableman v. Booth.

[133] Page 524.

The last of these important articles, written by Thomas Farrar, appeared in the *North American Review* for October, 1857.[134] He makes a keen dissection of the opinions, calling especial attention to the lack of agreement of the justices, and is severe upon the "groundless assumptions, false premises, and sophistical conclusions" of the Court's opinion. The "validity" of the whole subsequent proceedings depends upon the answer "given to the question as to the jurisdiction of the Court." The whole authority of the case hinges on this point," and it also "involves the character of the Court, the personal credit of the judges, and the honor of the nation." Since the delivery of the opinions, Farrar asserted that Taney's opinion had "sustained material interpolations, one or more of the others have been reproduced entire since that time, and others have undergone alterations, more or less material."[135]

Having decided that the Court had no jurisdiction, Taney went on to take up the "monstrous" position that "any descendant of imported African slaves, however remote," cannot be a citizen. Farrar raises the question as to citizenship of the United States, separate from that of the States, which question was settled by the Fourteenth Amendment. After deciding that Scott was a slave, and could not sue, the Court went on; for "there was yet much ground to be possessed," and held the Missouri Compromise invalid, though this decision was of no consequence to Scott.

Farrar summed up his contentions in the statement that, "by grasping at too much, the Court have lost the

[134] Vol. 85, pp. 392–415.

[135] Farrar, p. 400, suggests Grier and Campbell as having altered their opinions. I have found no evidence of any change except in Taney's, Wayne's and Curtis's opinions, and Wayne's is unimportant.

whole." As a "political manual, or text book," the decision will form a "rallying point and ear-mark for political partisans." The time for the Missouri Compromise is past. Stockholders will not bring slaves to Free States, nor Free States "desist from investing free colored inhabitants with any, or all, the rights of citizenship, whenever they choose" to do so. The chief result which Farrar foresaw of the decision was the "loss of confidence in the sound judicial integrity and strictly legal character of the tribunal"—a result which "may well be accounted the greatest political calamity which this country, under our forms of government, could sustain."

Later comment on the opinion by Northern men has been no more favorable than the earlier criticism. Horace Greeley[136] wrote that "the reader will be puzzled to decide whether law, humanity, or history is more flagrantly defied" by Taney. "The people are treated as inclining to usurp the power of excluding human bondage from their territorial possessions, so the Court decides that they have no rights in the premises, no power to act on the question."

J. M. Ashley of Ohio, in the House of Representatives, on February 13, 1868, attacked the decision bitterly, and made the unfounded charge that the rehearing of the case had been given, so that the Court might learn whether the Executive, with the army and navy, would support the usurpation.[137]

Henry Wilson[138] wrote, in 1874, that the decision's "interpretations and rulings were untrue in fact, bar-

[136] American Conflict, I, 251, 264.

[137] Cong. Globe 40th Cong., 3rd Sess., App. 211. See also Globe, 38th Cong., 1st Sess., App. 366.

[138] Rise and Fall of the Slave Power, II, 523, 533.

barous in spirit, absolutely revolutionary in their scope and intent, inhuman toward the black, and despotic and defiant towards the white population of the land." Instead of leaving slavery, as had been done in Prigg v. Pennsylvania, as a "matter of municipal regulation," it made it a "creation of the organic law of the land. . . . . The Constitution was no longer the sacred shrine of liberty, but the frowning Bastile of a most intolerable despotism."[139] Von Holst[140] speaks of Taney's "shallow and arbitrary" reasoning, and maintains that the Constitutional provisions[141] on the fugitive slaves and the foreign slave trade show that that instrument distinguished slaves from other forms of property.

As late as 1892, the *Nation*, in reviewing Carson's "Supreme Court," stated that the decision "ought never have been made, should never be forgiven." The tribunal was not acting judicially, and the "discordant fiat" displayed such diverse reasoning as to be disgraceful.[142] Carson himself had said[143] that, "in a moment of infatuation," Wayne "became convinced that the Court could settle political and moral questions for all time." The Court yielded to his view, and, "by a judgment, which they vainly endeavored to induce the country to believe was not extra judicial," sought to "settle the most agitated question of the day. The

[139] A. M. Ellis, in 15 Atlantic Monthly, 156, 161, for Feb. 1865, spoke of the Dred Scott Case as "the lowest depth." His anti-slavery feelings made him depreciate Taney, and to say "he was not venal, nor corrupt, nor a respecter of persons, but had a disposition to serve the cause of evil. . . . . There is little in all his judgments to raise him above the rank of respectable jurists. His own State was tearing off the poisoned robe, in the very hour in which he was called before the judge of mankind."

[140] Const. Hist., VI, 32.

[141] Const. Hist., VI, 42.

[142] Nation, Apr. 7, 1892, p. 269.

[143] Pages 366 to 375.

judgment was pronounced, but was promptly reversed by the dread tribunal of war." Carson considered that, having declared Dred Scott not a citizen, the Court ought to have dismissed the case. No portion of Taney's argument is "more labored or constrained than the attempt to show that, after disposing of the plea in abatement, which, when sustained, as it had been upon demurrer, ousted the jurisdiction of the Court, the Court had still a right to enter upon a discussion of the merits of the case. . . . . The real wrong-doing, of which the Chief Justice was guilty, was in attempting, by judicial utterance, to enter upon the settlement of questions purely political, which were beyond the pale of judicial authority, and which no prudent judge would have undertaken to discuss. It was a blunder worse than a crime, from the consequences of which he and his associates can never escape. The decision "did more to undermine the influence of this great tribunal and prostrate the personal influence of its members, as well as to blacken their record, than can be predicted of any other cause to be found in the length and breadth of our judicial career."

T. W. Balch recently summed up the matter, briefly, thus: the "Supreme Court was attempting to settle by a judicial decision, based ostensibly upon legal grounds, an economic difference of fundamental importance, which could only be decided by a trial of actual strength."[144]

Biddle, a life long Democrat,[145] insists upon "the great ingenuity and knowledge of the political history of this country" shown by Taney; but is forced to admit that Curtis's opinion is "profound in its examination

[144] A World Court, p. 69.

[145] Const. Hist., pp. 179 to 181.

of the sources of the law upon the subject, luminous and learned in its consideration of the political and judicial history of the country, and convincing in the conclusions to which it arrives." Taney was carried "beyond the proper limitations" of a plea in abatement. Curtis proved, to Biddle's mind, that free negroes, whose ancestors had been slaves, had acquired citizenship, and that by history, by the "inherent force" of the words of the Constitution,[146] and by "all fair and reasonable rules of construction," the Missouri Compromise was constitutional, and further, that the Supreme Court was not bound to follow the Missouri Court, which both disregarded the law and reversed the earlier decisions.

James G. Blaine, although an anti-slavery man, wrote one of the fairest estimates of the Dred Scott Case.[147] The decision did not settle the slavery question, but rendered "the contest more intense and more bitter. It was received throughout the North with scorn and indignation. It entered at once into the political discussions of the people, and remained there; until, with all other issues on the slavery question, it was remanded to the arbitrament of war. . . . . The decision developed a more determined type of antislavery agitation." Men remembered the rejection of the Whig nominations of Crittenden and Badger for seats in the Court. "Perhaps, in the whole history of judicial decisions, no two opinions were ever so widely read by the mass of the people outside of the legal profession," as Taney's and Curtis's. After the opinons had been delivered, Fessenden of Maine said, in the Senate, that Buchanan would never have been elected, had the decision been pronounced before the

[146] Art. IV, Sec. 3, paragraph 3.

[147] Twenty years in Congress, I, 131–134.

election, and that, if Frémont had been elected, "we should never have heard of a doctrine, so utterly at variance with all truth, so utterly destitute of all legal logic, so founded on error, and so nonsupported by anything resembling argument."

Blaine reminds us that "personally upright and honest as the judges were individually known to be, there was a convinction in the minds of a majority of Northern people that, on all issues affecting the institution of slavery, they were unable to deliver a just judgment."

The Chief Justice "was not only a man of great attainments, but was singularly pure and upright in his life and conversation. Had his personal life and character been less exalted, or his legal learning less eminent, there would have been less surprise and indignation." The lapse of years showed many antislavery men that it was unjust to condemn him more than the other justices who agreed in the decision. Time had not abated the "Northern hostility" to the decision, when Blaine wrote, over twenty-five years later, but had

thrown a more generous light upon the character and action of the eminent Chief Justice who pronounced it. More allowance is made for the excitement, and for what he believed to be the exigency of the hour, for the sentiments in which he had been educated, for the force of association and for his genuine belief that he was doing a valuable work towards the preservation of the Union. His views were held by millions of people around him, and he was swept along by a current which, with so many, had proved irresistible. Coming to the Bench from Jackson's cabinet, fresh from the angry controversies of that partisan era, he had proved a most acceptable and impartial judge, earning renown and escaping censure, until he dealt directly with the question of slavery. Whatever harm he may have done in that

decision was speedily overruled by war, and the country can now contemplate a venerable jurist, in robes that were never soiled by corruption, leading a long life of labor and sacrifice and achieving a fame in his profession second only to that of Marshall.

Professor Edward S. Corwin, in his "Doctrine of Judicial Review,"[148] discusses the decision with perspicacity and acumen. His conclusion is that the decision was not *obiter*, nor a following of Calhoun's ideas, nor did Curtis refute Taney's argument upon the question of Scott's title to a *prima facie* citizenship. "None of these results, however, goes far to relieve the decision of its discreditable character as a judicial utterance." It was not an "usurpation;" but was "a gross abuse of trust," and it put the "Court in the background," during the years of the Civil War and of Reconstruction.

After a dispassionate, careful study of the decision, Professor Corwin.[149] concluded that Taney's opinion was not "obiter," but was intended to be "the deliberate utterance of the Court, intended to have the force of law."

He stated that the charge against Taney amounted to saying that the action of the Chief Justice, in passing upon the constitutionality of the Missouri Compromise Act, was "illogical," because it was "inconsistent with the earlier part of his opinion," which removed "from the Court's consideration the record of the case in the lower court, and with it any basis for a pronouncement upon the constitutional question;" and that the action was also "in disregard of precedent," which "exacted that the Court should not pass upon issues other than

[148] Pages 129 to 159, a reprint of an article in 17 Am. Hist. Rev.

[149] Doctrine of Judicial Review, p. 133.

those the decision of which was strictly necessary to the determination of the case before it; and, particularly, than it should not, unnecessarily, pronounce a legislative enactment unconstitutional."

The primary question was "what disposition to make of the plea in abatement, which the Circuit Court overruled, thereby taking jurisdiction of the case?" The majority of the Court ruled that this plea was before it, and that the decision of the Circuit Court thereon was subject to review. Was it necessarily illogical, after pronouncing against the jurisdiction of the Circuit Court, and sustaining the plea in abatement, for the Court to consider the further record, by which the constitutional question was raised? Corwin's view is that, waiving the question of the plea of abatement, in Taney's theory of the case, the question of jurisdiction remained on the face of the bill of exceptions taken by the plaintiff, since Scott admits that he was born a slave and contends that he has become free, and so can sue in the character of a citizen. Consequently, Taney did not canvass the case on its merits, which he could have done with propriety only had he chosen to ignore the question of jurisdiction, but fortified his decision[150] by reviewing the issues raised in exceptions, and canvassed the matter of jurisdiction afresh. The validity of Taney's proceeding thus rests on the answer to this question: "It is allowable for a court to base a decision upon more than one ground, and, if it does so, does the auxiliary part of the decision become obiter?" Corwin refers to two views as to *obiter* matter in opinions: (1) that no part of an opinion is decisive, except such part as was absolutely necessary to determine the rights of the parties; or, (2) that every part of an opinion is

[150] Corwin, p. 136.

decisive which represents the deliberate application of the judicial mind to the questions legitimately raised in argument. The latter view he holds as correct, for the former one, "by keeping open a choice by interested parties between the diverse grounds of decision, would leave the law unsettled, precisely in proportion as the Courts had determined to settle it."

Corwin further holds that constitutional questions should be decided by a Court, whenever possible, since cases in which such questions occur "warrant an exceptionally broad view of the legal value of judicial opinion." Taney's critics take their view of the proper scope of judicial decisions from Common Law precedents, rather than from American Constitutional Law, in which the only feasible definition of *obiter* is "a more or less casual utterance by a court or the members thereof, upon some point not deemed by the Court itself to be strictly before it."[151] Corwin maintains that Taney had a "clear right to canvass the question of Dred Scott's servitude, in support of his decision that Dred Scott was not a citizen of the United States, and that he had the same right to canvass the question of the constitutionality of the Missouri Compromise, in support of his decision that Dred Scott was a slave." To all these points, Taney's attention was directed by the arguments of the counsel, and to all of them he might cast it with propriety. "If the decision, that the Missouri Compromise is unconstitutional, be unwarrantable," it is not because it was *obiter*, but because it was incorrect.

[151] He instances the fact that Marshall, in Brown v. Md., 12 Wheaton 419, says he "supposes," and that Taney in the License Cases, 5 Howard 574, ignores this pronouncement, while treating the rest of the opinion as law, although the second part of it, dealing with the commerce clause, was unnecessary, since the immediate issue had already been disposed of.

The entire Court agreed that Congress, in governing the territory, was controlled by the Constitution; but no common ground was found as to why the Missouri Compromise Act conflicted therewith.[152] Campbell took the extremest position, stating that the only power Congress had in the territories, in addition to those as the legislature for the whole country, was to make rules of a "conservatory character" for the "preservation of the public domain and its preparation for sale, or disposition." Consequently, it is the duty of the Federal Government to recognize as property whatever any State may "validly determine to be property." Benton showed that this theory, that the Federal Government must not only admit, but also protect slavery, was not yet ten years old, but Corwin thinks he was wrong, in saying that the theory rested exclusively on Calhoun's principles. Daniel went almost as far as Campbell in representing the power of Congress, in governing the territories, as a "simple proprietary power of supervision," yet he rejected Calhoun's notion that Congress was a mere trustee of the States.[153]

Catron had inflicted the death penalty on the Western Circuit for nearly twenty years, and could not admit that Congress had no power over the Territories, but said the Missouri Compromise was void, because incompatible with the treaty of cession of Louisiana, and with the spirit of the Constitution, which stipulated for the citizens of each state equal privileges with those of every other State. Corwin is forced to exclaim that: "a more extravagant line of reasoning it would be difficult to conceive!" The treaty clearly could not

[152] Corwin, p. 141.

[153] Corwin remarks that Catron, Grier, Wayne, and Taney would not read the Constitution "through the spectacles of the prophet of nullification."

prejudice Congress in the exercise of its Constitutional powers. The Constitutional provision referred to personal, not political rights, and, furthermore, there was no guarantee elsewhere to any one of rights he enjoyed in his home State.

"The most strongly nationalistic, or more properly federalistic, of all the opinions upon the constitutional question, was that of the Chief Justice," Corwin remarks. Taney followed Marshall, in tracing the power of Congress to govern Territories to its power to acquire them, which annexation might be made, only in order to make new States eventually.

Corwin also upholds Taney's correctness in "asserting for slave property a position within the Constitution, equal, to that of any other kind of property," and maintains that McLean's argument is "erroneous and beside the point," in stating that slavery was contrary to natural law, and that consequently, the Constitution recognized property in slaves in States, but not in Territories. "All property," Corwin rejoins, "is acquired in accordance with the laws of a particular State; but, when acquired, the right of the owner thereto is to be protected by the Constitution." Taney went too far, when he said that "the only power conferred is the power, coupled with the duty, of guarding and protecting the owner in his rights." Congress did not owe the "duty *always* to exercise a protective attitude towards all property in the exercise of all its powers, nor did slave property occupy a position of superiority to other property."

Taney relied on the due process of law clause, but this argument seemed irrelevant to Corwin, for property may be taken in case of an offence against the laws. It is implied that there has been no such offence, which

implication assumes the unconstitutionality of the Missouri Compromise—the point to be proved. If it was constitutional, it was a law, and any attempt to take a slave into a territory in contravention thereof, was an offence against the laws. Furthermore, due process of law simply involves correct judicial procedure and here no question of procedure was involved. Not the method of enforcement of the Missouri Compromise was opposed, but any enforcement at all of it; objection was made not to the mode of operation, but to the substance.

Corwin, however, finds that the Constitutional law of the period causes these difficulties to disappear; for it was "generally acknowledged that there were certain limits of the legislative power," which it could not exceed in the control of the owner's rights to property. In some States, this principle had been established on the basis of the phrases "due process of law," or "law of the land," so the argument was not irrelevant. By the same line of reasoning, Corwin makes the *petitio principii* vanish. For, if the due process of law clause prohibited legislation bearing with undue severity on existing property, the term *law* means law, as it stood before new legislation had been enacted, and the phrase "offences against the laws," means those against the laws so defined. In 1857, every court acknowledged that private property could be taken for public use, but there agreement ceased.[154] Taney entered on the

[154] Many States had already passed laws prohibiting the sale of liquor which laws applied to liquors in existence at the moment when the law went into effect, and these confiscatory acts were upheld in 12 States. Only in New York, in 1856, in a case decided between the two arguments of the Dred Scott Case, was there a disallowance of such a Statute as contrary to due process of law. Although Taney makes no reference to this decision, (Wynehamer v. People, 13 N. Y. 378), Corwin, rather strangely, has little doubt but that he took

Constitutional question to settle Congressional power over slavery actually existing and over slaves brought into the territory henceforth. The only effect of the Missouri Compromise, was to withdraw from owners entering the territory the right to bring in slaves. Curtis's statements were correct that this act stood on the same footing as to constitutionality as the North West Ordinance, or the laws of Maryland and Virginia against the importation of slaves. So that Constitution, by providing that the foreign slave trade should not be prohibited before 1808, assumed that otherwise Congress might earlier have restricted that trade under the power to regulate commerce.

Corwin, however, considers that Taney chose his "ground with prescience." The Republicans followed McLean, rather than Curtis, and seizing the word, liberty, in the Fifth Amendment, argued that Congress could not admit slavery into a territory.[155] In later cases, the courts have applied the doctrine of due process of law, especially in interpreting the fourteenth Amendment, and the terms liberty and property have been given an extended signification, while the doctrine that "all reasonable laws" give due process of law, has obviated the "legislative stagnation which the earlier decisions logically imported." Consequently, the Dred Scott Case has a "place in the line of precedents, from which had finally emerged one of the most fruitful doctrines of modern Constitutional law."

As to the question of citizenship, Corwin alleged that the "fundamental issue" between Taney and Curtis,

his doctrine from the New York Court! This case Corwin admits would not have affected the constitutionality of the Missouri Compromise as to Scott, who was brought into the territory after 1820, and the New York doctrine was in "flat conflict" with that of a dozen States.

[155] Corwin, p. 153.

though "not very specifically joined, is not whether there may not have been negro citizens of States in 1787, who, upon the adoption of the Constitution, became citizens of the United States; but from what source citizenship, within the recognition of the Constitution, was supposed to flow thenceforth." Curtis held that citizenship came through the States; but Taney's view was that a "citizen of the United States, to use his frequent phrase, unless descended from those who became citizens at the time of the adoption of the Constitution, owed his character as such to some intervention of national authority—in short, he was a product of the National government." Corwin considered Curtis's view as "doubtless that of the framers" of the Constitution, while Taney's pretence is, "at this point, particularly hollow;" but is a very logical and indeed inevitable deduction from his whole body of doctrine with reference to the dual nature of the federal system: the States, independent and sovereign within their sphere; and the National Government within its. This theory Taney had voiced from the beginning of his judicial career, so that at this point he was, at least, acting consistently with his part.[156]

Professor T. C. Smith had occasion, a few years ago,[157] to study this decision. Prior to it, he found the Court was cautious to avoid partisanship in slavery cases, and that "purely legal reasoning" was applied to the interpretation of the Constitution. In this case, however, Taney's opinion was "not so much a judicial statement as an elaborate essay upon the history of slavery under the Constitution, and a justification of the most radical Southern positions regarding the insti-

[156] Corwin, p. 157.

[157] "Parties and Slavery," in Hart's "American Nation" Series, pp. 195–208.

tution. . . . . Had Taney's opinion, with all its glaring inconsistencies, stood as that of a united court," it would have had great influence; "but it was almost as much damaged as supported by the variety in the concurring opinions." Professor Smith continued: "The political character of the whole performance, was stamped upon it in the phraseology of the opinion, as well as in the logical incoherence and superfluousness of the arguments, however able. . . . . The only results of the Dred Scott Case were to damage the prestige of the Court in the North, and to stimulate a sectional hostility which threatened to recoil upon the heads of the judges themselves." As a consequence, the great nationalizing decision which the Court soon made in the case of Ableman v. Booth, was looked upon throughout the free States as tinged with pro-slavery views.

Finally, we may quote the view of one of the members of the Supreme Court itself, in the opinion of Mr. Justice Brown, who said in 1901:[158]

> The difficulty with the Dred Scott Case was that the Court refused to make a distinction between property in general and a wholly exceptional class of property. Mr. Benton tersely stated that distinction, by saying that the Virginian might carry his slave with him into the Territory, but he could not carry with him the Virginia law which made him a slave.

[158] Downs v. Bidwell, 182 U. S. Rep. 244.

CHIEF JUSTICE ROGER BROOKE TANEY

From a portrait by Richard Blossom Farley, owned by Dickinson College

CHAPTER XIII

The End of the Era (1856–1861)

Although the Dred Scott Case was by far the most important one decided by the Supreme Court in the December term of 1856, it was not the only one in which Taney filed an opinion.[1] In a suit for a mandamus, to order a Minnesota Court to vacate an order of disbarment, he upheld the Court as performing a judicial act within the scope of its jurisdiction.[2] The rights of a patentee were held not to extend to a foreign vessel entering a United States port, equipped with the patented invention in the foreign country. The invention was only used while sailing. The plaintiff's contention would confer on patentees political power, in the Court's opinion, and enable them to embarrass the treaty-making power and the Congressional power to regulate foreign commerce.[3]

In a case concerning a lien upon a vessel, the barque *Laura* of Plymouth, for repairs made in Chile, Taney filed a long dissenting opinion, in which McLean and Wayne joined him. The freight money would have paid for the repairs, but for the diversion of the vessel's course by the master, with the assistance of the libel-

[1] Minor opinions of his were: (1) Prevost v. Greneaux, 19 Howard 7 (Inheritance tax of Louisiana upon foreigners approved); (2) Morgan v. Curtinies 19. Howard 8 (Record imperfect and no counsel for defendant-case continued); (3) Shaffer v. Scradley 19 Howard 16 (Supreme Court had no jurisdiction to review decision of Louisiana Court as to land in that State); (4) Stramer v. West 19 Howard 182 (Appeal not taken in time), (5) Burke v. Gaines 19 Howard 388 (Ejectment).

[2] Ex parte Secombe, 19 Howard 9.

[3] Brown v. Duchesne, 19 Howard 183.

lants, and no lien was allowed them by the Court, Justice Curtis rendering the opinion.[4] Taney maintained that almost the whole of the coasting trade was carried on by New England vessels under similar contracts, with masters "sailing upon a lay," as it was called. The captain was master of the vessel at the time and not the owners. Taney retained the same opinion, which he had held in the Circuit Court.

Taney's most important opinion at the December Term of 1857 was also a dissenting one, which Biddle[5] styled as being so strong "as to leave the professional mind in a considerable state of incertitude."[6] The case involved a vessel which had been seized under an attachment issuing from a Pennsylvania Court. Afterwards a libel had been filed in the United States District Court for mariner's wages. The Court's decision was that this libel did not divest the State Court of jurisdiction. Taney considered the case, not as one concerning the relative powers of State and Nation; but merely as one of relative powers and duties of Admiralty and Common Law Courts. Each has its appropriate sphere of action. The Court of Common Law has no right to place itself within the sphere of action appropriated peculiarly to the Admiralty Court and thereby to impede it in the discharge of duties imposed on it by the Constitution and laws. The lien of seamen is a first and paramount claim upon a vessel. No Court of Common Law can enforce, or displace this claim. A general creditor of a ship owner has no lien on a vessel and the sheriff had in his legal custody only the interest of the

[4] Thomas v. Osborn, 19 Howard 22. Taney's dissent at p. 33.

[5] Const. Hist., p. 185.

[6] Taylor v. Carryle, 20 Howard 583. Taney's dissent is at pp. 601 & ff. Three justices agreed with him. See Connor's Campbell, p. 49. Connor refers to Taney's "spirited and strong" opinion.

owner, after the liens had been heard and adjudicated. Otherwise, seamen might have to wait twelve months for payment. Neither a State nor a Federal Court of Common Law can impede an Admiralty Court. If the Court "intended to say that, in the administration of judicial power, the tribunals of the States and the United States are to be regarded as the tribunals of separate and independent sovereignties, dealing with each other in this respect upon the principles which govern the comity of nations, I cannot assent to it. The Constitution of the United States is as much a part of the law of Pennsylvania as its own constitution and the laws passed by the General Government, pursuant to the Constitution, are as obligatory upon the Courts of the States, as upon those of the United States; and they are equally bound to respect and uphold the acts and process of the courts of the United States, when acting within the scope of its legitimate authority." After this discriminating statement of the relation of Federal and State Courts, Taney continued; "the Court, which has no jurisdiction over the subject matter, must not lay hold of some other interest and, therefore, withdraw maritime liens from the Admiralty Court for an indefinite period." Pennsylvania can have no admiralty court and, therefore, has no concurrent jurisdiction in the matter.

With emphasis, Taney states that: "While, in my judgment, this court should be the last court in the Union to exercise powers not authorized in the Constitution, it should be the last court in the Union to retreat from duties which the Constitution and laws have imposed." He pays Coke[7] this tribute: "Every

[7] Further on in the opinion, he wrote: "These jealousies and suspicions of Lord Coke undoubtedly grew out of the vehement conflicts, personal as well as political, in which he was so prominently engaged during all his life-time."

one who, in early life, has passed through the usual studies of the Common Law feels the influence of his opinions afterwards in all matters connected with legal inquiries," but Coke was too bitter in his opposition to the admiralty court. At the time when Taney wrote this opinion, he thought that, if one looked for "examples worthy respect and commendation" in English law, these examples are found in the "elevated and enlightened character of its present courts of justice and their mutual respect and consideration for the rights and authority of each other, without any display of jealousy or suspicion." Taney continued with the statement:

I can see no grounds for jealousy, or enmity, to the admiralty jurisdiction. It has in it no quality inconsistent with, or unfavorable to, free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity, in every just and enlightened commercial nation. The delays unavoidably involved in a Court of Common Law, from its rules and modes of proceeding, are equivalent to a denial of justice, where rights of seamen, or maritime contracts, or torts, are concerned and seafaring men are the witnesses to prove them, and the public confidence is conclusively proved, by the well known fact, that in the great majority of cases, where there is a choice of jurisdictions, the party seeks his remedy in the court of admiralty, in preference to the Court of Common Law of the State, however eminent and distinguished the State's tribunal may be.[8]

[8] Minor cases in which Taney filed opinions for the Court are: (1) Brown v. Shannon, 20 Howard 55 (jurisdiction, patent rights); (2) Thompson v. Shelden, 20 Howard (continuance of case); (3) Carroll v. Dorsey, 20 Howard 204 (writ of error); (4) Payne v. Niles, 20 Howard 219 (writ of error); (5) Covington Drawbridge Co. v. Shepherd, 20 Howard 227 (jurisdiction, citizenship); (6) U. S. v. Breitling, 20 Howard 252 (Bill of exceptions); (7) Hemmingway v. Fisher (Admiralty Judgment), 20 Howard 255; (8) U. S. v. Pacheco, 20 Howard 261 (appeal, length of time); (9) Barton v. Forsyth, 20 Howard 532 (Exceptions must be taken while the jury are at the bar).

Two cases were concerned with the bonds of the State of Arkansas.[9] "Those who deal in the bonds or obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the Courts of the United States are expressly prohibited from exercising such a jurisdiction." If the suitor refused to file his bonds in Court, the Court cannot inquire whether the law acted hardly, or unjustly.[10]

In 1858, Taney handled the subject of the demarcation of the control of Congress over commerce and the right of municipalities to protect themselves with his "accustomed ability,"[11] in deciding the case of Cushing v. Owners of the Ship, *John Fraser*,[12] holding therein that an ordinance of the City of Charleston as to a vessel in the harbor, determining where it might lie, for how long, and with what light, was not in conflict with the law of Congress regulating commerce, or with the general admiralty jursidiction of the United States, but was valid.[13] In Converse v. Greeley[14] the Court held that

[9] Beers v. Arkansas, 20 Howard 527, and Bank of Washington v. Arkansas, 20 Howard 530.

[10] In Selden v. Myers, 20 Howard 506, Taney said that a person taking a promissory note and deed in payment for a restaurant in the District of Columbia, from an illiterate man must show, in order to enforce his claim, that at least the material parts of the instruments were read and fully explained to the illiterate person before execution and that the signer fully understood their meaning and effect. If this fact is not established, parol evidence is not admitted to show that the contract was really different from the writing.

[11] Biddle, Const. Hist., 186.

[12] 21 Howard 185. A collision case.

[13] Minor decisions at this term were (1) Richmond v. Milwaukee (Appeal), 21 Howard 80 and 391; (2) Rau v. Minn. & N. W. R. Co. (Motion to dismiss), 21 Howard 82; (3) Kelsey v. Forsyth (Procedure), 21 Howard 85; (4) Ins. Co. of Valley of Va. v. Mordecai (writ of error), 21 Howard 195; (5) Campbell v.

the Secretary of the Treasury could not order a collector to perform duties outside of the light house district of which he was superintendent, without extra pay for the additional services. The law does not forbid compensation for extra services which have no affinity or connection with the duties of the office holder, Taney said, speaking for the Court.

In a divorce case,[15] Taney dissented without an opinion from a decision by the Court upholding a Wisconsin divorce, secured there by a husband, who went to that State after his wife had secured a judicial separation from him in New York.

Taney's most important opinion, however, of the year 1858 was that in the case of Ableman v. Booth[16] and it was to Taney's own mind one of his "most satisfactory opinions."[17] There were two cases, both constituting one transaction and disposed of in one unanimous decision of the Court.[18] Sherman M. Booth was accused of

Boyreau (writ of error), 21 Howard 225; (6) Montgomery v. Anderson (Jurisdiction of Circuit Court in Admiralty) 21 Howard 386; (7) Baltimore v. Forsyth (Jurisdiction), 21 Howard 389; (8) Mason v. Gamble (writ of error), 21 Howard 390; (9) Porter v. Foley (writ of error), 21 Howard 393.

[14] 21 Howard 462.

[15] Barber v. Barber, 21 Howard 600.

[16] 21 Howard 506; Tyler, p. 608. See Daniel W. Howe "Political History of Secession," Chapter XI.

[17] Tyler, p. 392. Carson "Supreme Court," p. 293, considers that Taney was "most emphatic in the maintenance of the supremacy of the Federal Law." See also T. W. Balch "A World Court," p. 67.

[18] Willoughby, "Supreme Court of the United States," pp. 46, 50, is severe in his criticism of this opinion, writing that Taney, "in his analysis of government, never got further back than the State. If we were to accept the reasoning found in Taney's opinion, it was the people of the States, and never the people in their sovereign capacity, who acted throughout the period of constitution-making from 1765 to 1789." "In considering Taney's attitude in this case, we may, possibly, be warranted in remembering that, in this particular instance, the Federal law which he was upholding was one passed in the interests of the slaveholding party, with which his sympathies lay."

having aided, on March 11, 1854, in the escape, at Milwaukee, Wisconsin, of a fugitive slave from the deputy marshal, who held the negro in custody under a warrant issued by the United States District Judge, in accordance with the provisions of the Fugitive Slave Law of 1850. That law, a part of Clay's last Compromise, so far from settling the slave question, had greatly exacerbated conditions and, by its questionable provisions, had aroused the wrath of the people of the Free States. In several of the Northern States, so-called Personal Liberty Laws were passed, in the effort to nullify the Federal Statute.

Booth was arrested and, on May 26, was committed to jail, in custody of the United States Marshal. On the following day, he applied to a judge of the Wisconsin Supreme Court for a writ of habeas corpus, stating that Stephen V. R. Ableman the Marshal, restrained him of his liberty, illegally, because the arrest was made under the Fugitive Slave law of 1850 which was unconstitutional. Upon the hearing, the Justice decided that Booth's detention was illegal and freed him. Ableman then applied to the Supreme Court for a writ of *certiorari*, so that the proceedings at the hearing might be brought before that Court for revision. The *certiorari* was allowed and the case was argued in July, after which argument the Court affirmed the decision, discharging Booth from imprisonment. In October, Ableman sued out a *writ* of error to the United States Supreme Court and, in obedience thereto, the record and proceedings were duly certified by the State Court's clerk. Booth then in December 1854, filed a memorandum in the United States Supreme Court, submitting it as his argument. After the judgment was entered in the State Court and before the writ of error was sued out, that Court entered upon its record that, in the final

judgment, the validity of the Fugitive Slave Acts was drawn in question and the decision was against their validity. This certificate was not necessary to give the Federal Court jurisdiction, because the proceedings on their face showed that these questions arose and how they were decided; but it showed "that, at that time," in Taney's words, "the Supreme Court of Wisconsin did not question their obligation to obey the writ of error, nor the authority" of the Federal Court to "reëxamine their judgment," and "the certificate is given for the purpose of placing, distinctly, on the record the points that were raised and decided in that Court, in order that this Court might have no difficulty in exercising its appellate power and pronouncing its judgment upon all of them."

On January 4, 1855, Booth was indicted in the United States Court for the offence and, having been tried by a jury, was found guilty, on January 23, 1855, and was sentenced to imprisonment for one month and to pay a fine of $1000. On January 26, Booth applied to the Supreme Court of Wisconsin and was released, on February 3, after a hearing, on a writ of *habeas corpus*. The Attorney General of the United States then made a petition to the Chief Justice of the Supreme Court of the United States, stating the facts in the case and averring that the State Court had no jurisdiction. A writ of error was issued and served on the clerk of the Supreme Court of Wisconsin on May 30, 1855. No return was made to this writ and the district attorney made affidavit that one of the Judges of the State Court told him that that Court had directed the clerk to make no return, and to enter no orders upon the records of the Court concerning it. The United States Supreme Court then, on the motion of the Attorney General,

laid a rule on the clerk to make a return to the writ of error. This was not done and the Attorney General was given leave, in February 1857, to file a certified copy of the record in the State Court, which should have the same effect, as if returned by the clerk with the writ of error. The Wisconsin Judges behaved as badly as possible for men who had taken an oath to support the Constitution of the United States, and their court was as contumacious as the South Carolinians were a few months later, while the defendant was so indifferent that he was not represented by counsel. The Supreme Court did not permit this judicial nulification of Federal authority to go uncondemned. After waiting until the two cases were ready for decision, the Attorney General was heard for the prosecution and Taney delivered the opinion of the Court, having the pamphlet arguments filed by Booth and opinions of the Supreme Court of Wisconsin before them, to show the grounds on which the defence could rely.

Taney called attention to the fact that, in the first case, the State authorities claimed the right to discharge a prisoner who had been committed by a United States Commissioner for an offence against a national law and, in the second case, the State Supreme Court went a "step further" and, upon a "summary and collateral proceeding" by *habeas corpus*, claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States," and then "determined that their decision is final and conclusive upon all the Courts of the United States and ordered their clerk to disregard and refuse obedience to the writ of error issued" by the National Supreme Court. The gravity of the case was shown by Taney's statement that "the supremacy of the State Courts over the courts of the United States is now,

for the first time, asserted and acted upon in the Supreme Court of a State." The Chief Justice's language is calm and temperate, but his tone is firm. He strikes at the heart of the matter, when he states that "the paramount power of the State Court lies at the foundation of these decisions;" since their "commentaries" upon the fugitive slave law were "out of place," unless "they had the power to revise and control the proceedings" in this case. Their acts "can rest upon no other foundation." How can anyone speak of Taney as a States rights man after reading this opinion?

The alternative was a stern one; for,

> If the judicial power, exercised in this instance, has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission, and according to the judgment, of the Courts of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised, in relation to offences against the act of Congress in question, it, necessarily, follows that they must have the same judicial authority in relation to any other law of the United States. . . . . And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen that an act, which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and, indeed, as praiseworthy in another.

The inconvenience of doing away with the supremacy of the Federal tribunals could hardly be stated more clearly. Taney felt that to state this result of a lack of Federal supremacy showed the essential need of it. Hard cases, proverbially, make bad law and the hard case of a fugitive negro, seized under an oppresive statute

had led the Wisconsin Court to take indefensible action. "No one will suppose," Taney continued with indisputable logic, "that a Government, which has now lasted nearly seventy years, enforcing its laws by its own tribunals and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished, without the consent of the State in which the culprit was found."

The Wisconsin judges did not state whence they claimed this authority, but Taney places them in this dilemma, that if they possess this jurisdiction, "they must derive it either from the United States, or the State." The United States did not confer it upon them and the State could not do so, since, "although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and independent sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge, or a State court, as if the line of division was traced by a line of landmarks and monuments, visible to the eye." Taney felt that it was due to the State to say that this "claim of paramount jurisdiction in the State Courts over the courts of the United States" is not "asserted, or countenanced, by the Constitution or laws of the State of Wisconsin" and, indeed, the State Court's decision appeared to be flatly against a State Statute.

Taney then, in noble language, reiterated his statement that

> Questions of this kind must always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations; but mainly to secure union and harmony at home; for, if this object could be attained, there would be but little danger from abroad; and, to accomplish this purpose, it was felt by the statesmen who framed the Constitution and by the people who adopted it, that it was necessary, that many of the rights of sovereignty which the States then possessed, should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws, by its own tribunals, without interruption from a State, or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which that Government was established, and that local interests, local passions, or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

In these sentences, the old Federalist, the Attorney General of Andrew Jackson whose toast was the "Federal Union, it must and shall be preserved," the successor of John Marshall, spoke worthily of his past and of his predecessor.

Taney continued his great argument by calling attention to the fact that

> The supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution:

for, if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution, and laws and treaties, of the United States and the powers granted to the Federal Government, would soon receive different interpretations in different States and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to the very existence of the government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws, and that a tribunal should be established, in which all cases which might arise under the Constitution, and laws and treaties, of the United States, whether in a State Court, or a court of the United States, should be, finally and conclusively, decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, ... so carefully provided for, ... could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly it was conferred on the General Government, in clear, precise, and comprehensive terms. . . . . And it is manifest that this ultimate appellate power, in a tribunal created by the Constitution itself, was deemed essential to secure the independence and supremacy of the general Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the Courts of a State and the United States, if there was no common arbiter authorized to decide between them.

Taney pointed out that "the importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this Court jurisdiction over the sovereign States which compose the Union, when a controversy arises between

them," and that "experience has demonstrated that this power was not unwisely surrendered by the States;" since "irritating and angry controversies" between "adjoining States, in relation to their respective boundaries," might have ended in "force and violence, but for the power vested in this Court."

He then turned to the power of the Court to interpret the laws.

> The sovereignty created by the Constitution was limited in its powers of legislation; and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the Courts of a State and the Courts of the United States might and, indeed, certainly would often differ, as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

The Constitution contained a provision against this danger, by placing within the jurisdiction of the Federal Courts "all cases arising under the Constitution and the laws of the United States," leaving out the words "made in pursuance thereof," as applied to the laws; so that "the judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution."

He pointed out that "this judicial power" was "indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government." As a consequence, "by the very terms of the grant, the Constitution is under "the

judges' view, when any act of Congress is brought before them, and it is their duty to declare the law void and refuse to execute it, if it is not pursuant to the legislative powers conferred on Congress." No clearer nor more cogent statement of the rightfulness of the Court's power to declare laws unconstitutional was ever made.

> And, as the final appellate power, in all such questions, is given to this Court, controversies as to the respective powers of the United States and the State, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see that if such an arbiter had not been provided in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our governments, State and National, would soon cease to be governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

To prevent the danger of changing the tribunal, because of "individual ambition or interests and powerful political combinations," the framers of the government "ingrafted it upon the Constitution itself." "So long . . . as this Constitution shall endure, this tribunal must exist with it; deciding, in the peaceful forms of judicial proceeding, the angry and irritating controversies between sovereignties, which, in other countries, have been determined by the arbitrament of force."

The Judiciary Act of 1789, which carried "into execution the powers vested in the judicial department" was enacted by the First Congress at its first session, when that body had many members, who had been also members of the Constitutional Convention and understood "the meaning and intention of the great instrument, which they had so anxiously and deliberately

considered, clause by clause, and assisted to frame." The law they passed proves that their interpretation of the appellate powers of the Supreme Court was that which Taney had just enunciated, since they provided for the issuance of writs of error from the Supreme Court to a State Court, "whenever a right had been claimed under the Constitution or laws of the United States, and the decision of the State Courts was against it." Thus we see the "great importance, which the patriots and statesmen of the First Congress, attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference, or obstruction by States, or State tribunals."

Next he turned to the case in hand and sternly said that the Supreme Court of Wisconsin "refuses obedience to the writ of error and regards its own judgment as final. It has not only reversed and annulled the judgment of the District Court of the United States, but it has reversed and annulled the provisions of the Constitution itself and the Act of Congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one."

The State Judge had the right to issue the writ of *habeas corpus* in any case, provided that it "does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States;" but, when the State Judge is "apprised" that the party is in such custody he "can proceed no further;" for he then knows that "the prisoner is within the jurisdiction of another Government."

No State Judge or Court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of

judicial process, or otherwise, should attempt to control the marshal, or other authorized officer, or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference.

These are strong and fine words.

Taney next turns to view the question from the side of the States.

Nor is there anything in this supremacy of the general Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy, or offend the natural and just pride of State sovereignty. Neither this Government, nor the powers of which we were speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it upon the general Government and surrendered by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to, or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all executive and judicial officers of the several States (as well as those of the General Government) shall be bound, by oath or affirmation, to support the Constitution. . .

Now it, certainly, can be no humiliation to the citizen of a republic to yield a ready obedience to the laws, as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered, when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And, certainly, no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. . . . .

And no power is more clearly conferred, by the Constitution and laws of the United States, than the power of this Court to decide, ultimately and finally, all cases arising under such Constitution and laws; and, for that purpose, to bring here for revision, by writ of error, the judgment of a State Court, where such questions have arisen and the right claimed under them denied by the highest judicial tribunal in the State.

In conclusion, and by way of brief postscript, so "as not to be misunderstood" the Court stated that, on its judgment, the Fugitive Slave Law was, "in all its provisions, fully authorized by the Constitution."

The opinion is remarkable for its strength and viriliity, especially when we remember that its author was a man eighty two years old. The Federalist teachings of his youth had not been forgotten and the doctrines learned in youth were clearly set forth by him in his old age. It is the irony of fate, that the South, which rejoiced at the reversal of the decree of the Wisconsin Court; by its secession was so soon to traverse and flout Taney's elaborate constitutional argument, from which the North and West gained a valuable precedent, though, for the most part, they had disliked the upholding of the Fugitive Slave Law.

In the remainder of 1859 and in the early months of 1860, Taney pronounced only two decisions of the court and neither of these is of importance.[19] In the early portion of 1860, Taney maintained a correspondence with Van Buren, as the latter, who was compiling his memoirs, asked for information.[20] In these letters,

[19] (1) Hodge v. Williams, 22 Howard 87, (writ of error cannot be amended); (2) Brewster v. Warfield, 22 Howard 119, (Interest on promissory note in the Territory of Minnesota); (3) Haney v. Baltimore Steam Packet Co., 23 Howard 287, (collision between steamer and sailing vessel in the Chesapeake. Dissents, in long opinion).

[20] 10 Md. Hist. Mag., pp. 15 & ff.

Taney spoke of a recent illness and of recovery from a fall, of his having burned the letters which he had formerly received from Van Buren and of the good care which his unmarried daughter, Ellen, took of him.

The term of Court which began in December, 1860, virtually closed Taney's important opinions as Chief Justice on the Bench of the Supreme Court; for, although he lived for over three more years and continued to hold his post, the decision in the case of Kentucky v. Denison[21] is his last noteworthy one delivered in Washington. He delivered a brief eulogy upon his associate Mr. Justice Daniel at the opening of the term[22] and gave the decision of the Court in eight cases during the session.[23] He held that a stamp duty laid by California on bills of lading for gold or silver transported from the State, was a tax on exports and, therefore, invalid and that the case could not be distinguished in principle from Brown v. Maryland—Taney's old case continually reappearing.[24]

Upholding the Federal power, he held that a corporate franchise to take tolls on a canal can not be seized and sold under a *fieri facias*, unless the proceedings were authorized by a Federal Statute.[25]

[21] 24 Howard 66.

[22] 24 Howard VI.

[23] Minor cases were: (1) Sampson v. Welsh, 24 Howard 207 (libel on ship for damages); (2) Wiggins v. Gray, 24 Howard 303 (Practice); (3) U. S. v. Curtis, 24 Howard 346 (Mexican land grant in California); (4) Lessee of Smith v. McCann (Ejectment in Maryland, rather an important case), 24 Howard 398; (5) Riddall v. Bryan, 24 Howard 420 (Trespass, Appeal from decree of Maryland Court of Appeals); (6) Tracy v. Holcombe, 24 Howard 426 (Final judgment); (7) Myra Clark Gaines v. Hennen, 24 Howard 553. (Dissent. No opinion.)

[24] Almy v. Cal., 24 Howard 169. Biddle praises this judgment. Const. Hist. 188.

[25] The Canal was that from Havre de Grace, along the Susquehanna River and into Pennsylvania. Gue v. Tidewater Canal Co., 24 Howard 257. The case was an appeal from the Circuit Court in Maryland.

The decision in the case of Kentucky v. Denison was pronounced by Taney on March 13, 1861, nine days after he had administered the oath of office as President to Abraham Lincoln.[26] Biddle[27] speaks of Taney's "tone of almost pathetic dignity" in this opinion and Tyler speaks of the "calm, serene spirit of justice" which pervaded this and the other chief opinions of his last years;[28] but William C. Coleman, an able Baltmore attorney, in a recent article, pronounced a harsh judgment upon it:[29] "we can scarcely call it reasoning, for it is totally unconvincing as a piece of Constitutional interpretation." Taney's "reasoning was political, not legal," and though the case is still of authority, it seems to Coleman irreconcilable with the undoubted power granted the Federal Government by the Constitution[30] to carry out all the provisions of that document.

The circumstances of the case were that a Grand Jury in Kentucky had indicted Willis Lago, a "free man of color, for seducing and enticing a slave to leave her master and aiding and assisting the said slave in an attempt to make her escape." Lago fled to Ohio to avoid arrest and the Governor of Kentucky duly requested the delivery of Lago. Governor William Denison of Ohio, by the advice of his Attorney General, refused to comply with this demand, whereupon the State of Kentucky, by its Governor, Beriah Magoffin, made a motion, asking Denison to show cause why the Supreme Court should not issue a *mandamus*, commanding him to deliver Lago, to the Kentucky authorities, that he might be removed to the latter State for trial.

[26] Tyler, pp. 413, 626.

[27] Const. Hist., p. 187.

[28] Tyler, p. 417.

[29] 31 Harvard L. R., pp. 229, 233, 245. October, 1917, "The State as Defendant."

[30] Article 4, Section 2.

Taney delivered the opinion of the unanimous Court, "sensible of the importance of this case and of the great interest and gravity of the question involved in it."

By a careful historical investigation, he proved that, in all cases where original jurisdiction is given by the Constitution, this Court has authority to exercise it, without any further act of Congress to regulate its process; that the Governor is the proper officer to bring a suit for a State, or to be notified as representing the State, when it is a defendant; and that the writ of mandamus (being no longer a prerogative writ or one of grace) is the only mode by which Kentucky's claim can be enforced, if that claim is a rightful one.

He then quoted the Constitutional provision as to the interstate extradition of criminals and stated that the words "treason, felony, or other crime" "embrace every act forbidden and made punishable by a law of the State." The Governor of Ohio insisted that the words quoted from the Constitution "must be restricted and confined to offences already known to the Common Law and to the usage of nations, and regarded as offences in every civilized community and that they do not extend to acts made offences by local statutes, growing out of local circumstances, nor to offences against ordinary police regulations." Taney denied the correctness of this construction, which was "founded upon an obvious mistake as to the purposes for which the words 'treason and felony' were introduced. They were introduced for the purpose of guarding against any restriction of the word crime, and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice." These words show that "this compact was not to be regarded or construed as an ordinary treaty for extradi-

tion, between nations altogether independent of each other, but was intended to embrace political offences against the sovereignty of the State, as well as all other crimes."

The Constitution was declared by Taney to be a "compact," binding the States "to give aid and assistance to each other in executing their laws, and to support each other, in preserving order and law within its confines, whenever such aid was needed." He maintained that "the Statesmen who framed the Constitution were fully sensible that, from the complex character of the Government, it must fail, unless the States mutually supported each other and the general Government, and that nothing would be more likely to disturb its peace and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process."

Taney then showed that the New England Confederation of 1643 and the Articles of Confederation contained clauses providing for extradition and stated that in the change from the term "high misdemeanor" in the Articles of Confederation to the word "crime" in the Constitution "the deliberate purpose" was shown to "include every offence known to the law of the State from which the party charged had fled." The decision asserted that "this compact, engrafted in the Constitution, ... gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given 'to demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to

the policy or laws of the State to which the fugitive has fled." This demand may be made, only when "the party was charged in the regular course of judicial proceedings," for "the Executive Department can act only in subordination to the judicial Department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process, and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the Judicial Department." He then discussed the origin and provisions of the act of 1793, which provided for the procedure of such extradition. Under that procedure, the duty of the Governor of the State where the fugitive is found, was "merely ministerial" and "such as every marshal and sheriff must perform, when process, either criminal or civil, is placed in his hands." "Whether the charge against Lago was legally and sufficiently laid in this indictment, according to the laws of Kentucky," in Taney's phrase, "is a judicial question to be decided by the Courts of the State, and not by the executive authority of the State of Ohio."

Yet,—oh! lame and impotent conclusion!—the opinion goes on to state that "the words, 'it shall be the duty,' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created." Neither the Constitution, nor the act of Congress provided "any means to compel the execution of this duty, nor inflict any punishment for neglect, or refusal." The Court believed that "such a power would place every State under the control and dominion of the general government" and that it was clear that "the Federal Government, under the Constitution, has not power to impose on a State officer, as such, any duty

whatever, and compel him to perform it." The final words of the opinion were that, "if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department, or any other department, to use any coercive means to compel him."

"And upon this ground, the motion for the mandamus must be overruled." Though the conclusion is weak, yet we must remember that, it was the unanimous opinion of a court, of which all of the members but one continued loyal to the Nation throughout the whole of the war and that it was determined upon by them just before the close of Buchanan's administration, when so strong a Union man as Horace Greeley opposed coercion of the seceding States and when only those so clear thinking and determined as Lincoln contemplated the possibility of bending the will of the cotton States, so as to make them continue in the Union.

We should also remember that, even in recent days, the Supreme Court has had great difficulty in the important case of Virginia v. West Virginia, in endeavoring to find a method to enforce its decrees against a State. Institutions were crashing around the Court and we ought the rather to give it credit for pointing men, at this terrible crisis, to their duty to obey the Constitution, even if the Court could find no means of obliging men to perform that duty.

This was the last of Taney's important Supreme Court opinions. Biddle,[31] after a careful study of them all, calls Taney the "able, faithful, and, with very small exceptions, the correct expositor" of the Constitution.

[31] Const. Hist., p. 199. He says that a "large debt of gratitude is due" Taney "from members of the profession of law, students of constitutional history and lovers of free representative government throughout the world."

Four tickets bearing the names of Presidental candidates solicited the support of the voters of the United States in 1860. John C. Breckenridge represented the Southern Wing of the Democratic party and ran upon a platform, which said that, during the existence of a Territory, "all citizens of the United States have an equal right to settle with their property in the territory,"—that is to say carrying their slaves with them. Stephen A. Douglas headed the Northern wing of the Democrats. They and their leader had favored popular or squatter sovereignty in the territories, and had, in their platform, a plank that all should respect "the measure of restriction, whatever it may be, imposed by the Federal Constitution on the power of the Territorial legislature over the subject of the domestic relations, as the same has been, or shall be, finally determined by the Supreme Court." The remnant of the Whigs, and the Know-Nothings, together with many Border State Union men, supported John Bell, on a brief platform, pledging themselves to the "Constitution of the United States, the union of the States and the enforcement of the laws."

The Republicans, representing the anti-slavery sentiment of the North and West, headed by Abraham Lincoln, claimed that the "new doctrine, that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States is a dangerous political heresy."[32] The mere statement of these facts shows how far the Dred Scott decision had fallen from settling the question of slavery in the territories.

During the campaign,[33] a communication, designed probably to influence the votes of Roman Catholics,

[32] Stanwood, "History of the Presidency," Chapter 21.

[33] Tyler, p. 405.

appeared in a newspaper, stating that Taney favored the election of Douglas, a statement so unlikely that we hardly need any assurance that it was incorrect. George W. Hughes, a Congressman from Maryland and an intimate friend of Taney, wrote Taney, asking that he might be permitted to contradict the statement. On August 22, 1860, Taney answered the letter, declining to take any notice of an anonymous publication. Whatever he "might say, or authorize to be said, would be regarded" as said "by Chief Justice of the Supreme Court and it would be unseemly in that officer to take any notice of anonymous publications in newspapers."

To answer the letter would give it too much importance and Taney had never seen any notice taken of it, "although I am accustomed to look over papers on every side of this mixed up and confused election." Furthermore any authorized contradiction would get up discussions about Taney "among all the small fry politicians," who could use this opportunity to avoid "discussing the great principles of government, which are in issue in the election." Taney believed that the members of his Church in Baltimore were "as much divided as other churches and vote as independently of leaders," as any citizens do.

Furthermore, Taney gave his rule of political conduct:

> Every one, whose opinion is worth anything, knows that, since I have been on the Bench, I have carefully abstained from taking any part in political movements or elections; and that I have done this from a sense of duty, and under the firm conviction that any other course would destroy the usefulness of the Supreme Court and create the belief that it was a mere party body and acting for the interests of a party.
>
> I never speak upon political issues of the day in public, nor in mixed companies; nor do I enter into any argument, or ever

express any opinion to friends who I know differ from me, or who I think may be so inconsiderate as to repeat what I say, in a way to involve my name in public discussions, as one who is taking part in the canvass, and supporting or opposing a particular candidate. To my intimate and confidential friends, *as you know*, I speak freely and without reserve.

Abraham Lincoln was elected and, on the day upon which he took the oath of office administered to him by Taney, he said in his inaugural:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that, if the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

This was clearly intended and skilfully worded as an attack upon the use of the Dred Scott decision as a precedent. Taney's friends held up their hands in horror, exclaiming, How awful a political heresy![34] yet Taney himself, as the instigator and defender of Jackson's veto of the recharter of the United States Bank and

[34] Tyler, p. 412.

as the courageous author of the opinion in the Genessee Chief, could not consistently have made any objection to this position.

The older era had come to an end. Before Lincoln's inauguration, the cotton States had seceded from the Union. Four of the nine justices had been appointed from slave States. Taney's State, Maryland, did not secede, and he remained silent, giving no aid to disunionists, nor yielding the powerful support of his voice or pen to the successful efforts of the Unionist leaders —Reverdy Johnson and Henry Winter Davis. Catron of Tennessee and Wayne of Georgia were distinctly Union men and refused to follow their States, when these seceded. Campbell of Alabama went with his State and resigned from the Supreme Court. Before leaving Washington, on April 29, he wrote Taney[35] expressing

> the profound impression that your eminent qualities, as a magistrate and jurist, have made upon me. I shall never forget the uprightness, fidelity, learning, thought, and labor, that have been brought by you to the consideration of the judgments of the Court, or the urbanity, gentleness, kindness, and tolerance that have distinguished your intercourse with the members of the Court and Bar. From your hands, I have received all that I could have desired and, in leaving the court, I carry with me feelings of mingled reverence, affection, and gratitude.

Taney's life continued for three and a half years more, but no important opinion from him was delivered from the Bench of the Supreme Court. We may, therefore, here sum up his achievement as Chief Justice. His service in standardizing the practice of the Court is often alluded to and was a useful one.

[35] 5 Md. Hist. Mag. 35.

Thayer in his "Select Cases on Constitutional Law" prints Taney's decisions in the Charles River Bridge Case (1837), the License Cases (1847), Luther v. Borden (1848), and the Dred Scott Case (1857). He also prints in part Dinsman v. Wilkes (1851) and Mitchell v. Harmony (1851). To these, one may well add Ableman v. Booth (1859) and Kentucky v. Dennison (1861).

Above any other opinion in importance stands the great case of the *Genesee Chief* (1851). These are his great decisions.

T. C. Smith,[36] after a careful survey of the period, thought that he found, from the time of Van Buren, the new Democratic judges disposed to restrict the activity of the Court to purely legal matters, and that the "sudden plunge" of the Court into the slavery controversy in the Dred Scott decision was due "to a sort of revolution within the Court itself." Upon constitutional questions, he found a "disconnected attitude" of the Court and a "lack of controlling principles."

During the fifties, the commercial expansion of the country absorbed the time of the Court. "Public land cases from the newer States and Territories, especially from California; admiralty cases from sea, lake, and river; and interstate cases called" on the Court to play its part in a "new era of industrial competition." He believed that, "whenever the Court was obliged to face questions involving constitutional construction, the Jacksonian Democracy of most of the judges prevented any firm and consistent policy." The "strong reverence" for States rights of most of the justices led them to favor the States, whenever possible without a direct reversal of Marshall, in Smith's opinion. He finds,

[36] "Parties and Slavery," volume 18 of Hart's "American Nation" at p. 190. "The Supreme Court and Slavery."

McLean, Wayne and Curtis, Federal in tendency, though inconsistent. Taney "was uncertain in his attitude, at times maintaining, with vigor a position identical with Marshall's and, at other times, adopting the full States Rights phraseology." Nelson of New York, Catron of Tennessee, Grier of Pennsylvania, Campbell of Alabama, and Daniel of Virginia were always on the side of States Rights. Smith bears witness to the opinion in the *Genesee Chief* as being worthy of Marshall himself, "for clearness, force, and breadth."

Clarkson N. Potter, after a careful count, stated that Taney rendered about three hundred opinions of the Court and only seven dissenting ones, three of which were in admiralty cases, while he differed from the majority in twenty-six cases more, where either no dissenting opinion was filed; or, as was more often the case, he agreed with the dissenting opinion of another justice.[37]

George W. Biddle, one of the most discriminating of Taney's admirers,[38] considered Taney as similar to Marshall in his "high moral attributes, firmness of intellectual grasp, simplicity and directness of purpose, and equanimity and calmness of temperament." When he came to the Bench, the "Strength of the General Government had been demonstrated." While Chief Justice, he showed himself as "earnest, active, watching with untiring industry" over the Court's "deliberations, dealing promptly and successfully with the vast and varied mass of litigation which came before him and his associates and disposing of it, with a learning and ability that gave entire satisfaction to the body of

[37] 4 Am. Bar Ass. Reports, p. 191. A. B. Hagner in his sketch of William Cranch, in 3 Great American Lawyers 116, speaks of the reversal of three of Taney's decisions on Circuit by the Supreme Court, viz.: (1) Gills v. Oliver, 11 Howard 548, (2) 12 Howard 111, (3) Williams v. Oliver, 17 Howard 258.

[38] Const. Hist. p. 123–125.

suitors, and to the people at large, and extorted the admiration of many of his old political opponents. The judgments delivered by him as the organ of this tribunal as well as the occasional dissents pronounced by him, have with rare exceptions, been finally received as correct expositions of the law." These judgments are "distinguished by their clearness, directness, and firm grasp of the subject discussed, and, when dealing with constitutional subjects, for sound and weighty reasoning."[39]

He laid down three principles which he believed he he found in Taney's opinions.[40] (1) He adhered closely to the language of the Constitution, construing no power to exist which was not "found in its words or resulting therefrom by necessary implication." (2) He showed an "anxious desire to protect the several States in the full and unfettered exercise of the powers retained by them." (3) Where "room was found for a broader interpretation" of the Constitution, "in conformity with the needs and quality of right of all the States, no hesitation was felt in overpassing the narrow limits within which a formal construction would have confined the jurisdiction of the Federal Courts."

After all, Taney's constitutional position may be summed up[41] by saying that he remained to the end a Southern Federalist, of strong prejudices, who found it

[39] I can not find any evidence in these judgments for Biddle's further claim that they showed thorough acquaintance with the political history of the Country.

[40] Const. Hist., pp. 195–197.

[41] Mikell, Taney's admirer, 4 Gt. Am. Lawyers 133, writes that Taney was "an independent thinker upon constitutional questions. After the counsel has exhausted his arguments, Taney will decide with him, after rejecting his arguments, on reasons worked out by himself and, not infrequently, after an exposition of the fallacy of such arguments more incisive and convincing than that furnished by the opposing counsel." I have found no proof of this.

very difficult to change his mind. Even when he thought he had done so in the doctrine of Brown v. Maryland, he retained to the end of his life a distrust of too great widening of the power of Congress to regulate commerce. He disliked corporations and almost all of the decisions which he made, which have been called States Rights ones were based upon one or the other of those grounds.[42]

[42] Carson "Supreme Court," p. 295, writes that Taney's "manner and style are described as impressive, logical, clear, calm, argumentative, simple and unostentatious, addressed to the reason and not to the passions."

CHAPTER XIV

Taney's Career as Circuit Court Judge

On April 8, 1836, six days after Taney had taken the oath of office as Chief Justice, the term of the Circuit Court of the United States for the Distict of Maryland opened in Baltimore with Taney presiding upon the bench. It was customary that one of the Justices of the Supreme Court should sit in each term of the Circuit Court which was held within a certain number of States which had been allotted to him. Taney frequently went to hold court in Virginia and Delaware. In Baltimore[1] he was present nearly every April and November, at the terms of Court, though occasionally, the length of the term of the Supreme Court[2] kept him in Washington too long to permit him to sit in the April term.[3]

Of these Sessions, Tyler writes:

> There was always in the Court, the most perfect order. As a presiding officer, dignity and authority sat upon his brow. His own singular courtesy not only diffused itself through the bar and all the officers of the Court, but it was contagious among the crowd. No officer was permitted to look at a newspaper, but was required to be intent upon the proceedings of the Court. Every one was made to feel that he was where solemn duties were to be performed.
>
> At the beginning of a term, when the list of jurors was called, he attended to every name.

[1] John Quincy Adams (Memoirs X, 346) notes that he attended April term of Court in Baltimore held by Judges Taney and Heath. On Nov. 17, 1846, Taney adjourned court on account of the death of Chancellor Theodorick Bland and spoke eloquently of his great learning, ability and faithful service. Later Taney presided at a memorial bar meeting.

[2] As in 1852.

[3] Taney, Dec., p. 362.

When he heard a familiar name of a Frederick County juror, he "asked the marshal to tell the juror to come to him after the adjournment, and, if he then found the man to be a relative of an old acquaintance, he "made the kindest inquiries into their family affairs."

A volume of opinions delivered by Taney in the Circuit Court at Baltimore was prepared by his son-in-law, James Mason Campbell, Esq., and was published in 1871.[4] Sixty-eight cases are reported in this volume: thirty-four of them being at law, seven in equity, and twenty-seven in admiralty. In date, they range from 1836 to the famous Merryman decision of 1861.[5]

The charge to the Grand Jury had been quite a feature of the opening of the terms of the Circuit Court in Baltimore, and, when Justice Samuel Chase had sat there, he had taken advantage of the occasion to make political speeches under guise of these charges. Taney resolved to end the practice and his first charge on

[4] Campbell died before publication of the volume, and Frank M. Etting who married one of Campbell's daughters, copyrighted it. Mr. ——— Brightley of the Philadelphia Bar read the proof. In an introductory note,Taney's family expressed their appreciation of these services. The volume is entitled "Reports of Cases at Law and Equity and in the Admiralty determined in the Circuit Court of the United States for the District of Maryland by Roger B. Taney," and contains 620 pages. In an appendix, are printed the 1836 Charge to the Grand Jury and Taney's Remarks on Lord Bacon's Maxims.

[5] The first 270 pages are occupied with the Law Cases; pages 271 to 377 are devoted to Equity Decisions and pages 379 to 609 are filled with Admiralty Cases. Chronologically, the cases are dated as follows: 1836, one in Admiralty; 1837, none; 1838, two at Law and three in Admiralty; 1839, none; 1840, eight at Law and three in Admiralty; 1841, two at Law, one in Equity and four in Admiralty; 1842, one at Law; 1843, none; 1844, two in Admiralty; 1845, one at Law, one in Equity, and one in Admiralty; 1846, one at Law and one in Equity; 1847, three at Law; 1848, one in Equity; 1849, two at Law; 1850, one at Law and one in Equity; 1851, five at Law and four in Admiralty; 1852, three at Law; 1853, one at Law, one in Equity, and two in Admiralty; 1854, one at Law, one in Equity, and one in Admiralty; 1855, two at Law; 1856, one in Admiralty; 1857, one in Admiralty; 1861, one at Law (the Ex parte Merryman Case).

April 8, 1836 was also his last.[6] He told the jurors that "precise and detailed instructions were no longer needed;" because, "through the diffusion of education," jurors had a general knowledge of their duties and the District Attorney would give them help, if they needed it. He hoped that few infractions of the law would be brought before them, and, therefore, would not enlarge upon crimes against the United States. Continuing the charge, he said that: "It is my earnest desire that we should proceed at once, with industry and energy, to execute the duties for which we are assembled and while we give to every subject brought before us the most ample time for full examination and elaborate judgement, not a moment should be wasted in unnecessary forms."

He urged the jurors to be diligent in their inquiries, and careful and elaborate in their conclusions, showing no sympathy with criminals, who offended against a "criminal code so mild and forbearing as ours," and guarding "the innocent from injury." "In a country like ours," he concluded, "blessed with free institutions, the safety of the community depends upon the vigilant and firm execution of the law; every one must be made to understand, and constantly to feel, that its supremacy will be steadily enforced by the constituted tribunals, and that liberty cannot exist under a feeble, relaxed, or indolent administration of its power, where crime goes unpunished and the law is contemned."

A few of the decisions reported involve questions of public law. The very first case in the volume[7] was one in which Taney held constitutional the provision in the Judiciary Act of 1789, giving the United States District

[6] See Niles Reg., p. 120 for April 16, 1836; Tyler, p. 270, Taney's Dec. 615.

[7] Gittings v. Crawford, April term, 1838; Taney's Dec. 1.

Courts a jurisdiction over consuls in civil cases. He considered the grant by the Constitution to the Supreme Court of jurisdiction over ambassadors and consuls, as not an exclusive one. Consequently, a consul, who did not possess the immunities of an ambassador, could be made liable in civil suits in an inferior court.[8] At first sight, the decision seemed to conflict with expressions used in Marbury versus Madison.[9] Taney's views as to the proper attitude of the Circuit Court toward the Supreme Court are thus stated:—"It would hardly have been proper or decorous in the Circuit Court to disregard" Marshall's "opinions, although they were expressed, when the point in controversy wasnot directly before" the Supreme Court, but that the later case of the United States versus Ortega showed that the Supreme Court considered the point still an open one.[10] Taney continued as to the constitutionality of statutes thus: "Independent, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of Congress, passed in 1789, a violation of the Constitution. It was the first Congress that met under the Constitution and in it were many men who had taken a prominent and leading part in framing and supporting that institution, and who, certainly, well understood the meaning of the words they used." If State Courts had concurrent

[8] He followed U. S. v. Ravara, 2 Dallas 297 (1793–1794) and U. S. v. Ortega, 11 Wheaton 467.

[9] Taney maintained that Cohens v. Va.—6 Wheaton 378 repudiated and overruled some of the principles put forth in Marbury v. Madison—2 Cranch 137—and that Osborn v. U. S. Bank—9 Wheaton 820—was not pertinent, because it concerned a question of the relative jurisdiction of the United States and a State.

[10] Vide also Davis v. Packard 7 Peters 281.

jurisdiction with federal courts in some cases, why should the grant of original jurisdiction to the Supreme Court be always an exclusive one?[11]

When a Malay, born in Manila, was indicted for murder[12] Taney gave an interesting decision, holding that the Malays were not white men. The accused man was a subject of Spain, and had been baptized. He was one of the crew of the American brig, *Fannie*, and killed the Captain, the only white man on board, on October 31, 1839, while the ship was on the high seas. The other members of the crew were three negroes from the United States and a mulatto from Nova Scotia. These, by the Maryland statute of 1717,[13] were not competent to testify against a white, Christian, person. Taney stated that the Provincial Law was made for "political purposes, and grew out of the political and social condition of the Colonies. The colonists were all of the white race, and all professed the Christian religion." No others were expected to come to the Province, or would have been recognized as equals "by the colonists, or deemed worthy of participating with them in the privileges of this community." The "only civilized nations" they knew, were the white Europeans. "The political community of the colony was composed entirely of white men, professing the Christian religion." "The white race," continued Taney, "did not admit" negroes or Indians "to political or social equality. They were

[11] Cohens v. Virginia showed that the construction given to Marbury v. Madison—that an original jurisdiction was excluded, where an appellate one was given and *vice versa*, could not be sustained, without depriving the Court of some of its most important and necessary powers, which, though classed as original, could only be exercised in an appellate form, when the question arose in a suit in a State Court.

[12] U. S. v. Dow, April term, 1840. Taney's Dec., 34.

[13] Not by the Common Law.

regarded and treated as inferiors, of whom it was lawful, under circumstances, to make slaves." As a natural result, feelings were "created that would make it dangerous" for whites to receive as witnesses against themselves the "members of the two races which" had been "thus degraded." A Malay was regarded in Maryland as one of a race which might be enslaved.[14] The act of 1717 made negroes and Indians incapable of being witnesses against each other in cases which might affect life or member from a different reason, viz.: "the barbarous and brutish ignorance of the two excluded classes, and their crude and monstrous superstitions, which rendered them incapable of feeling, or appreciating the obligation of an oath," as a Christian should. In process of time, however, the Indians disappeared, and the negroes became "instructed in the doctrines of the Christian religion and made aware of the sanctity and obligation of an oath," so that the law of 1808 made them competent witnesses in all cases, except against white men. The trial resulted in a conviction of the Malay.[15]

A less important case grew out of a riot in Baltimore on June 1, 1849.[16] The mob had torn down the buildings of a rope walk, and the jury brought in a verdict for the defendant. In his charge, Taney held that, even if the "buildings were so dilapidated as to be a nuisance, they could not be abated by a riotous and tumultuous assemblage." The plaintiff had to show, in order to recover damages, that the mob was too strong to be resisted

[14] Vide the case of a Madagascar woman in 3 H. & McH. 501.

[15] On the ground that "allegations fatally repugnant" had been made in the indictment, stating that the crime had been committed "then and therein," which was interpreted to mean in the District of Maryland and also "out of the jurisdiction of any State," a new trial was had, followed by a second conviction.

[16] Duffy v. Baltimore, November term, 1852. Taney's Dec., 200.

without the aid of the civil authorities, that the city authorities had reasonable ground for believing that the mob had assembled, or would do so, and did not use reasonable diligence to suppress it, and that the damage had not occurred through a sudden excitement, which was not apprehended and which there was no time to prevent.

In a case in which the compensation of a federal office-holder was involved, Taney held that he was not entitled to more than his salary, but that he might charge for acting for the Federal Government in a different capacity.[17] "There is no law which prohibits a person from holding two offices at the same time. As a matter of policy, it would certainly be highly exceptionable, in most cases, as a permanent arrangement; but, in the absence of any legal provision to the contrary," such a plurality was valid and, as a temporary expedient, is often no more expensive, but "more convenient and useful to the public, than to bring in a new officer to execute the duty."[18]

Several cases arose under the tariff laws. A charge of a specific duty on salt includes the sack containing it, on which no additional *ad valorem* duty is to be laid. Taney would not infer an intention to lay such latter duty, because the relative value of the sack to the contents is larger than that which the vessel, or outside wrapper, usually bears to the merchandise imported in it. When the "law was passed, it was the established course of trade to import fine salt in sacks," so that

[17] U. S. v. White. Taney's Dec., 152; April term, 1851.

[18] No allowance was made for hire of a porter, nor for services as pension agent by the navy agent at Baltimore, but allowance given for serving as acting purser to the naval establishment at Annapolis and for office rent to end of the quarter.

there was no unfair evasion of the law in this mode of importation.[19]

Hearthrugs, of worsted, made out of wool by combing, were not to be considered manufactures of wool, but were "worsted stuff goods," or non-enumerated articles.[20]

The value of blankets[21] and the importation of sugar from the West Indies[22] were the subjects of cases. In the latter case, Taney held that "the principles of justice would seem to require that the merchant should be charged with duty, only upon the merchandise which he actually introduces into the country. He imports nothing more and brings in nothing more for sale or consumption . . . . If the duty is charged upon what is lost, as well as what arrives, he will pay, in almost every case, a higher duty upon his importation than the law intends to impose."

Two cases were concerned with attempts to recover duties paid under protest upon pimento imported from Jamaica. In the one, Taney held invalid the collection of a greater duty than allowed by the merchant appraisers.[23] In the other,[24] Taney held that the suit might be brought in the name of the actual owner, as well as in that of the consignee, but that the protest must not object in general terms to the duty charged, without assigning a reason.[25]

Three cases were concerned with vessels' bonds. The schooner, *Elvira*, sailed from Baltimore to Havana in

[19] Karthaus v. Frick, April term, 1840. Taney's Dec., 94.

[20] The time of payment was also considered. Riggs v. Frick. Taney's Dec., 100; April term, 1840.

[21] Hoffman v. Williams, November term, 1842. Taney's Dec., 69.

[22] Brune v. Marriott, April term, 1849. Taney's Dec. 133.

[23] Tucker v. Kane, November term, 1850. Taney's Dec., 146.

[24] Mason v. Kane, April term, 1851. Taney's Dec., 173.

[25] Bartlett v. Kane, April term, 1852. Taney's Dec., 186. This was a suit to recover duty on Peruvian bark paid under protest.

1839, and never returned, being sold there and the crew discharged.[26] Taney held that the bond given by the master, under the law of 1803, for the return of the crew to the United States, did not embrace this case. The law had been passed to protect sailors from injustice and despotism of the captain, and to preserve them for the service of our own marine, but did not extend to a case where the vessel did not return, However, a judgment was given for failure to return the register[27] of this vessel. The question then came up as to whom did the amount recovered belong, and Taney held that it was not liquidated damages, as the United States suffered no damages, but that it was a "specific penalty upon the owner and master, for the commission of a particular offence against the policy of the law," imposed "by reason of his violation of a duty imposed by the act of Congress," and consequently, a moiety should be paid to the collector, naval officer, and surveyor of the Port.

The schooner, Catherine, was built in Baltimore in 1839, and was also taken to Havana and sold there.[28] The certificate of registry was likewise not returned. The vessel was seized, on the allegation that it was used in the slave trade, and brought to New York, where the court dismissed the case. The allegation was made in that suit that the owner was an American citizen and the defendant tried to use this fact before Taney to prove that the vessel had not been sold to a foreigner. Taney said that, if the vessel had been condemned, the fact that the owner had been an American, would have been even more in his favor, and that there was an obvious fallacy in an argument, which would enable the

[26] Montell v. U. S., April term, 1840. Taney's Dec., 24.
[27] U. S. v. Montell. April term, 1841. Taney's Dec. 47.
[28] Allen v. U. S., November term, 1840. Taney's Dec., 112.

defendant to win, whichever way the sentence of the court in New York had been given. In fact, the ship had been acquitted, because it had not been used in the slave trade, and, if it had been acquitted on the ground that it was an American vessel, that judgment would have been conclusive only in a civil suit, and not in a criminal proceeding, like this one.

Two negligence cases are reported. In the first one, Stockton, who owned a coach line running between Baltimore and Wheeling, was sued by Saltonstall, who, with his wife, had been passengers on one of the coaches in December, 1835.[29] The coach upset somewhere between Hancock and Cumberland, and from the accident Mrs. Saltonstall received such severe injuries as to render her a cripple for life. Saltonstall alleged that the driver was drunk and turned the horses improperly, so that Saltonstall opened the door of the coach and jumped out. His wife followed him and the coach overturned, falling upon her. The defence was that the ground was icy, causing the horses to slip, and that, if Mr. and Mrs. Saltonstall had remained within the coach, they would not have been hurt. Taney held that the owners must show that proper skill and care were employed, and that the accident happened without their fault. If a passenger is injured, the presumption is that negligence was the cause and the disaster is a *prima facie* evidence of such negligence. The owner must show that the driver exercised a high degree of caution and prudence, and the least negligence on his part, which produced bodily injury to a passenger, would make the owner liable. The injuries were not caused by violation of contract, but were breaches of a duty imposed by law upon the

[29] Saltonstall v. Stockton, November term, 1838. Taney's Dec., 11. Affirmed by Supreme Court in 13 Peters 181.

carrier. If the misconduct of the driver placed the plaintiffs in immediate peril, which "was brought upon them without any fault of want of care on their side," it was "impossible, at that moment, to foresee whether it would be safer to remain in the carrage or spring from it; they had nothing left to them but a choice of perils, and one of them must be encountered." The defendant "must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted." If the driver was so overcome by extreme cold, that he could not manage his horses and perform his duty, the plaintiff cannot recover, and if there was the slightest evidence conducing to prove this, the question must be left to the jury, for the "court has no right to suppose that the jury would form a verdict upon slight and insufficient testimony, or without any testimony to warrant it."

Some years later[30] an action was brought against the City of Baltimore to recover damages for injuries sustained by falling into Harford Run, where it crossed Canal Street, now Central Avenue. Taney held that the city authorities were exclusive judges of the time, place, and manner in which the streets should be opened, graded, paved, and made highways, and that the omission of the city to grade and pave the street on which the accident occurred and to place a rail at the side of the Run, or to cover it, was not such negligence as would support the action.

J. V. L. McMahon and Thomas S. Alexander were associated as counsel in the case of Budd v. Brooke's Lessee.[31] Some years later, McMahon spoke with great admiration of Taney's part in this case, an "intricate and

[30] Hughes v. Baltimore. April term 1855. Taney's Dec. 243.

[31] Tyler, 309. The case is unreported.

most perplexing" one in ejectment, which was on trial before Judges Taney and Heath for nearly a month. At the close of the case, which was hurried to enable Taney to attend the Supreme Court, it was expected by all parties that all the "complicated facts and the difficult questions growing out of them, would have been fully presented to the Court by the prayers and arguments of the counsel on both sides." But to the great surprise of the lawyers, "without a prayer or argument on either side," Taney delivered an opinion which "not only showed a perfect acquaintance with all the complicated facts of the case, but it also referred to, and covered all the numerous questions of law which were to have been presented by our carefully prepared prayers."

McMahon was "entirely unprepared for the display of intellect by the Chief Justice," and felt that "accustomed as I had been to the manifestations of his forensic and judicial ability on many previous occasions, ... this outstripped them all."

At the November term of 1847,[32] a case of an alleged fraudulent sale was tried. A Philadelphian was proprietor of a factory at Rockland, which was managed by his brother who resided there. In April, 1846, the business was sold to one Folwell, who resold it to the brother on the same day and the business was continued by him under the old name. In August, the Philadelphian's creditors sued out a writ of attachment, and seized the machinery and goods, claiming that the sales were without consideration, and consequently void. The resident brother sued the creditors for the value of the property seized, and for damages for breaking up his business. Taney said that, if the sales were fraudulent, and collusive, they were void; that the measure of the damages

[32] Comly v. Fisher. Taney's Dec. 121.

was the value of the goods seized, plus the actual damages received for breaking up the business; and that the sale was void, unless the change in the possession had been made public.

A resident of Illinois[33] brought an action for damages for false imprisonment, and Taney held that he must show not only want of probable cause, but also a malicious intent on the part of those who complained against the present plaintiff.[34]

Questions of contract appear in several of the reported cases. Three of these cases concern insurance. The owner of the brig *Victoria*, a British subject living at Nassau,[35] sued a Baltimore insurance company, which in defence alleged the unseaworthiness of the ship and the negligence of the master. Taney charged the jury that the vessel must have been seaworthy when insured, to enable the owner to recover, but that the burden of unseaworthiness was upon the defendant, and that, if a leak found at Nassau was not such but that a master of competent skill and judgment might have reasonably supposed that the ship was seaworthy, then an omission to repair the vessel at Nassau constituted no bar to recovery of insurance.

The Barque, Margaret Huggs, sailed from Baltimore to Rio de Janeiro and thence to Montevideo, where she loaded a cargo of beef.[36] A storm drove the barque into Nassau, and caused most of the cargo to be spoiled

[33] Burnap v. Albert, April term, 1855. Taney's Dec., 244.

[34] Lane v. Beltzhoover, November term, 1840. Taney's Dec., 110. Taney held that a *fieri facias* in the names of two plaintiffs, after one of them is dead, is irregular and defective, but may be amended.

[35] Adderly v. Am. Mutual Ins. Co., November term, 1847. Taney's Dec., 126. The jury found a verdict for the defendant.

[36] Hugg v. Augusta Ins. & Banking Co., April term, 1851. Taney's Dec., 159.

or thrown overboard. The Court in the Bahamas decreed $2,100 as salvage, and the cargo was sold for about $2,700. The case went to the United States Supreme Court[37] and was remanded for a second trial, which resulted in a verdict for the plaintiffs. In that trial, Taney charged the jury that the plaintiff could recover for a total loss of freight, only if the ship could not have been repaired within a reasonable time, and at a reasonable expense and, if the expense of completing the voyage and delivery of the remainder of the cargo would have exceeded the amount of freight that would have been carried.[38] Insurance on goods[39] may not be recovered, if the plaintiff, designedly or with fraudulent intent, withheld from the defendant information needed, nor if he made a false oath; but loss of papers, or accident, does not bar him from recovery.

When a banknote was taken in the usual course of business, *bona fide* and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business that the note was lost or stolen, the fact that such had been the case is no valid defence.[40]

The Maryland Constitution of 1851 forbade usurious contracts, and the law of the State was that such a contract was entirely void and unenforceable. In a case where a defence of usury was urged, Taney held[41] that there can be no civil right, where there is no legal remedy

[37] 7 Howard 595.

[38] He held that in Maryland the allowance of interest was a question for the jury.

[39] Betts v. Franklin Ins. Co. of Philadelphia, November term, 1851. Taney's Dec., 171. Verdict for plaintiff.

[40] City Bank of Columbia v. Farmer's and Planter's Bank of Baltimore, November term, 1847. Taney's Dec., 119.

[41] Dill v. Ellicott, November term, 1854. Taney's Dec., 233.

nor can there be a legal remedy for an illegal act. This incapacity to maintain an action on such a contract is no forfeiture, nor penalty; for there is nothing to forfeit where no right of action has been acquired. He referred to the Constitution, "containing the fundamental law of the State," as "an instrument solemn and deliberate."

No action was permitted by Taney to lie on a contract to pay for services rendered in procuring from the legislature of Virginia a right of way for the Baltimore and Ohio Railroad through that State,[42] as it was against the policy of the law to pay for a man's services as a "lobbyman," especially if the contract was secret and the legislature knew nothing of it. In any case, the law passed by the Virginia legislature was materially different from that which the railroad proposed to the plaintiff, and the passage of that particular law was a condition precedent to the payment.

A contract was made between two Baltimoreans for the sale of a house upon Mt. Vernon Place. The contract was repudiated by the purchaser, and the owner sold the house for a lower price and then sued the other party to the contract for damages for breaking it. Taney refused to allow any recovery, because, when the suit was brought, no stipulation in the contract had yet been broken[43] and the plaintiff, consequently, had no legal demand upon which action could then be brought.

Some Liverpool merchants had consigned to them at Swansea, Wales, a cargo of copper from Chile, shipped

[42] Marshall v. B. & O. R. R., November term, 1852. Taney's Dec., 204.

[43] That is, the first payment was to be made in 18 months, and that term had not yet expired. Greenway v. Gaither, November term, 1851. At November term, 1853, in same case, Taney would not sign a bill of exceptions, presented two years after trial, being not satisfied that there had been error in instructions to the jury. Taney's Dec., 227.

in the brig *Hope*.[44] The owners of the brig resided in Baltimore and sent her to Montevideo with a cargo of lumber, and thence to Valparaiso for copper. There the signer of the charter party refused to load the brig, saying that she was too old; but the master secured a cargo from another source. On the return voyage, severe weather was met off Cape Horn, and the brig made Pernambuco in great distress and unable to proceed further. The cargo was landed, and extensive repairs were made, for which ship and cargo were hypothecated. The brig then sailed to Swansea, and, upon her arrival there, an admiralty court gave a decision against the ship and cargo to pay for these repairs, and the proceeds of the sale did not pay the entire bill. The consigners then brought suit in the United States Court at Baltimore against the owners to recover the net proceeds of the cargo, after deducting the sum received from the underwriters and the freight. The ship was not insured, so that the owners had made a total loss. Taney stated the questions in the case as: (1) are the owners of the ship personally responsible to the owners of the cargo? and (2) by what rules of law are the rights of the plaintiffs and the liabilities of the defendants under the contract to be measured? The plaintiffs answered the latter question, by those of the Common Law. Taney replied that he saw no sound reason for applying to this case the principles of the Common Law as to Common Carriers for hire, and that the master had not by the Common Law, authority to make a contract for a cargo. When the refusal to execute the contract occurred at Valparaiso, the master, under the Common Law, should have notified the consignees of that fact, and awaited their orders. The principles of the Com-

[44] Naylor v. Baltzell, November term, 1841. Taney's Dec., 55.

mon Law do not prevail in Chile, and the contract was neither made in Maryland nor to be performed there. The master had, however, by the maritime law, the right to make a contract, by which the ship and her freight were bound. He might pledge that value, but no more. Otherwise the ship owner would have to hazard his whole fortune upon every distant voyage of his vessel. It can never be for the interest of the owner to put repairs on a vessel greater than its value, though it may be for the interest of the cargo. Further, the plaintiffs stood by and saw the cargo sold in the admiralty court, without appearing to defend it, or to require from the lender any proof of the necessity of the repairs. For all these reasons, Taney allowed them no recovery.

To remove the bar of the statute of limitations,[45] Taney held there must have been an express promise to pay, or an admission of the debt, in such terms as to imply that the debtor is willing to pay it. When a person files a list of debts under the insolvent law, there is no such admission of indebtedness as implies that he is willing to pay them all to their full extent, but rather that he wishes to be discharged without paying them in full.

When an executor gave bond to his surety to pay him half of his commissions, in consideration of his consenting to act as surety, he executed a valid instrument.[46] In an action on such a bond, a premium paid a new surety, required by the Orphans Court, is not to be allowed as a set off. An agreement between the executor and surety to waive commissions during the life of the

[45] Ga. Ins. & Trust Co. v. Ellicott, November term, 1849. Taney's Dec., 130.

[46] Culbertson v. Stallinger, April term, 1840. Taney's Dec., 75.

testator's widow, is not a condition annexed to the bond, and, not being under seal, cannot operate as a release or defeasance. Such an agreement would be enforced in a court of equity, but not at law. Equity would also consider whether the insolvency of the first surety and the requirements of an additional surety permitted the insolvent to continue entitled to any share of the commissions which accrued, after his name had ceased to be available as surety. The executor had a right to employ counsel and to pay him reasonable fees and set them off against the surety's share of the commissions.

A man was appointed, by the captain of a naval vessel, as acting purser and died without confirmation of his appointment. His administrator sued the United States for commissions.[47] The allowance was not given by act of Congress, but by the Naval Regulations. As the plaintiff's salary was fixed by the act of 1814, Taney refused to allow the commissions, saying that the regulations could not increase the renumeration fixed by law. The Navy Department's construction of a law should be given respect, but "cannot be allowed to alter the law, nor to control its construction in a Court of Justice." "This usage,"[48] Taney added, "is not to expound but to repeal the Act of Congress."

One copyright case[49] reported for the infringement of the copyright of the song entitled: "The Old Arm Chair." To enable the jury to determine whether the tunes were similar or not, Taney permitted Mr. John Cole, an old professional singer, to sing them both in Court, and, as a bystander remembered the scene, "the

[47] Goldsborough v. U. S., April term, 1840. Taney's Dec., 80.

[48] The District Court should have allowed nothing, but granted the administrator one per centum and, as the United States had acquiesced in the decree, Taney did not disturb it.

[49] Reed v. Carusi, November term, 1845. Taney's Dec., 72. Tyler, p. 312.

Chief Justice, with that power peculiarly his own, of restraining almost by a glance, the slightest breach of decorum in his Court, overawed and repressed every demonstration of disrespect by the placid and dignified attention which he bestowed throughout upon Mr. Cole's musical efforts."

Two patent cases at law and two in equity, are found[50] An interesting equity suit was tried at the April Term of 1841.[51] An American citizen, domiciled in Buenos Ayres, shipped a cargo to Gibraltar on an American schooner, commanded by an American. The papers concerning the cargo were made out in the name of the master, to protect it from Brazilian cruisers, as Buenos Ayres and Brazil were at war. The vessel was captured and lost, together with its cargo. The master then prosecuted a claim for the cargo, as his own, against Brazil, and agreed with the owner to pay over the amount secured after deducting the charges. Before the decision was made in Brazil, the master died, and Neale, a Baltimorean, who took out letters of administration upon his estate, successfully prosecuted the claim. The amount received was brought into court as the master's assets. Duffy, the owner, then sued Neale for the money. Neale died before the trial, and the jury

[50] In law: Knight v. B. & O. R. R., November term, 1840. Taney's Dec., 106. A judgment of $5,000 was recovered for infringement of a patent for end bearings, and Larabee v. Colton, April term 1851. Taney's Decisions 180, infringement of a patent shower bath.

In equity: Wilson v. Turner, April term, 1845. Taney's Dec., 278, concerning an assignment for the time of the renewal of the patent for Woodworth's planing machine (a decision affirmed in 4 How. 712)—and Crosby vs. Lapouraille, November term, 1854. Taney's Dec., 374, in which Taney held that a combination in machinery is patentable, if the combination is new, although the elements are old, provided the combination is invented by the patentee and is not a mere effort of ordinary mechanical skill.

[51] Duffy v. Neale's Administrator. Taney's Dec., 271.

gave a verdict against his estate. There were no assets, and Duffy tried to get funds from Neale's administrator. Taney held that the original right merged in the judgment obtained at law, and that, therefore, Duffy could not charge Neale's administrator.

In a later suit concerning the estate,[52] of a Charles County man, who had left a bequest of $1000 for the endowment of "the Society for the education of pious young men for the ministry of the Protestant Episcopal Church," Taney held the bequest was invalid, because of a decision in Maryland courts against the validity[53] of such bequests to unincorporated and voluntary associations of individuals. The famous Girard will case was not to be considered as a precedent on the other side, for its decision was founded on the common law of Pennsylvania, and the Circuit Court of the United States must administer the law of the state in which it sits, and must reaffirm the decisions of the highest judicial tribunals of that State. In Equity, a Federal Court is governed by English Chancery law as to the remedy and as to its form; but not as to the right of the complainant.[54]

Taney had occasion to consider the laws against usury and gambling in the case of Thomas vs. Watson[55] and held that[56] "while the laws against usury are intended to protect the necessitous against the oppression of the money lender, and against hard and ruinous contracts, forced upon them by their wants, the laws against gaming are founded upon a policy equally sound and clear, and are intended to discountenance a vice in-

[52] Meade v. Beale, November term, 1850. Taney's Dec., 339.

[53] Dashiell v. Atty.-Gen., 5 Harris & Johnson, 392.

[54] A very able brief by Henry Winter Davis in behalf of Bishop Meade, is printed, together with Taney's Decision.

[55] April term, 1846. Taney's Dec., 297.

[56] Page 305.

jurious to society and often most ruinous to the individual." A man had confessed judgment on two promissory notes, one on an usurious and one on a gambling consideration. Then he became insolvent, and his trustee, filing a bill in equity for relief from an execution upon the judgment, called the creditor to state the true consideration of the notes. On a demurrer, Taney held that, as the defendant had not objected to answer, on the ground that he would thereby be subject to penalty of forfeiture, he could not avail himself of this defence, nor would it have been a valid defence in any case; since, merely making an usurious contract did not subject the lender to a forfeiture, and he was not asked to state the circumstances under which the money was won on the gaming debt, but inquiry was merely as to whether the consideration was a gaming debt. There were many ways in which he might have won the money, without subjecting himself to a penalty. An affirmative answer would undoubtedly prevent him from recovering the money, but that loss was not a penalty, or forfeiture, within the meaning of the law. The principle on which a court will grant relief after the voluntary payment of money must also entitle one to relief after a voluntary confession of judgment, and an omission by the debtor to defend himself is no bar to the relief asked by the trustee, for these questions were not decided in the suit at law.[57]

In the case of Lowry vs. Commercial and Farmer's Bank of Baltimore[58] Taney properly held the bank liable for negligence, in not preventing a fraudulent transfer

[57] The Maryland Law of 1845 was too late to be appealed to, in its abrogation of the penalties of the law of 1704 as to usury and permission to the lender to recover the sum loaned with legal interest.

[58] April term, 1848. Taney's Dec., 310.

of its stock. In Wartman vs. Wartman[59] he considered an application to discharge a man from an attachment for contempt of court. The defendant's father had devised him money in trust for another son and his children. This brother's only child brought suit for the money and the defendant denied the parenthood of the child and, while the suit was pending, distributed the fund, so as "to evade and defeat any order the court might make for the security of the fund." He had failed to bring the money into court and Taney refused to permit him to be heard, till he purged himself from contempt. An attachment had been issued, and the defendant was in jail. He pleaded that he had no notice. Taney denied this, and said that contempt does not depend upon one's intent, but upon the act done. From his conduct, the conclusion was irresistible that he acted so as to show contempt for the court and defraud the complainant of any possible right the court's decision might give him. By filing a schedule of his property with a trustee, showing that he had not the ability to pay the sum, or by paying the money into court, he might be released, but upon no other condition.

Baltimore was a great commercial emporium, and the United States Courts had an exclusive admiralty jurisdiction, so that we are not surprised to find a number of opinions upon important Admiralty Decisions. Two suits arose out of ship building.[60] In one of these suits, Culley had contracted with the Federal Government to build the brig Lawrence for the Navy, and Donohue was a sub-contractor, who did extra work, by direction of the government inspector. To charge Culley for this work, Donohue must show, Taney decided, not only that

[59] April term, 1853. Taney's Dec., 363.

[60] Donohue v. Culley, April term, 1844. Taney's Dec., 468.

the work was not embraced in the original specifications given him by Culley, but also that it was embraced in the specifications given Culley by the Naval Department.

The other case was a libel to recover for labor and materials furnished the ship *Scotia*.[61] Leslie had engaged Smith to build the vessel. He was a vessel-builder, but had never built a full rigged ship before, and agreed to build it below the usual price, not expecting to make any money, but hoping to save himself and to obtain the reputation of a first rate ship-builder. Leslie promised, verbally, to pay half a dollar a ton more than the contract price, if the ship were well built. Smith had two sureties, one of whom was named Glass. The other one acted at Leslie's request that he exercise his influence on Smith to urge him on (under an express agreement that he should not be held liable). After the contract was signed, Leslie changed the plan of the ship with Smith's consent, but without consulting the sureties, thereby making the construction more expensive. Leslie's confidence in Smith was soon shaken, and, on the very day on which the keel was laid, when Smith called on him for $1000, he took a receipt and an assignment of all rights to the ship, which assignment was kept secret until Smith stopped payment. The ship was launched on January 1, and about that time one of Smith's notes fell due. Leslie refused to make further advances, and Smith became insolvent and could not go on with the work. Those who worked on the ship, or furnished materials for her, applied to Leslie, who repeatedly said that all just bills would be paid. Glass had been employed by Smith to do outside joiner's work, and, in January, certain bills receivable were

[61] Leslie v. Glass, April term, 1840. Taney's Dec., 422.

transferred by Smith to him. Since the completion of the vessel, Leslie had refused to pay Glass and others, on the ground that they gave Smith credit.

Taney held the scales of justice even, and said that, in general, the person for whom the vessel is built is not liable for debts contracted by a shipwright, and, when he pays the money due according to the contract, he is entitled to a delivery of the vessel, free, and discharged from any claim. Ordinarily, also, general declarations made by the person for whom the vessel is built, after the work has been done or the materials furnished, that he will pay therefor, will not bind him, even if the vessel is worth more than the contract and the shipwright is insolvent, for the promises are without consideration, and, consequently, cannot be enforced. In this case, however, if the assignment had become known to the workmen, they would have lost confidence in Smith, and the assignment was kept secret to preserve his credit and enable him to go on with the ship. Smith gained a false credit, and, if Leslie intended thereby to obtain, on Smith's credit, labor and materials necessary to build the ship, without becoming personally responsible, the design was one which a court of justice cannot sanction. It was hardly just to Leslie to decide the matter thus, however, for when he took the assignment, he supposed it would be for the advantage of both of them to sustain Smith's credit, by concealing the assignment, and that Smith would make a profit from building the ship. The ship had hardly been finished, when the libel was filed and Taney was persuaded that the present defence was "owing more to irritation caused by these circumstances than to any deliberate design to break the promises he had made, or to be unjust to the creditors." After the assignment, the ship became

Leslie's property and so his promises were not without consideration, and he must pay the bills.[62]

A number of cases were concerned with repairs made to vessels. They illustrate the trade of the times. Taney rebuked a fraudulent transfer of a schooner in Port au Prince, which was intended to cheat one who had advanced on it money for repairs.[63] He decided that a claim for copper furnished a vessel sailing from New York to Rio de Janeiro was not proven, when the debt was secured by a note of the consignees of the brig.[64]

In a third case, in which a vessel formerly owned by a Baltimorean had been sold to residents of New York, the decision was that the burden of proof lay upon the new owners, to show that the repairs, which were made after the sale, were not done upon the credit of the master, in which case there would be no lien upon the brig.[65]

The schooner *Light* was owned by two persons, but was registered in the name of one of them only, and the libellants, ship-carpenters, who did work on the vessel, had no knowledge of the other's interest, he yet was held liable also for the debt to them.[66]

The schooner *El Caballero* sailed from Savannah to Havana with a cargo of rice. A bill for repairs on the vessel was drawn upon the owner in Baltimore.[67] The consignee at Havana gave the master an advance of money to take up the bill which had been protested and

[62] As Leslie had suffered some hardship, in paying for the ship more than for other similar vessels, and Glass had suffered accounts to accumulate without asking Leslie about them, no costs were allowed.

[63] Herwig v. Oakley, April term, 1838. Taney's Dec., 389.

[64] Phelps, Dodge and Co. v. Brig *Camilla*, April term, 1838. Taney's Dec., 400.

[65] Jones v. Brig *Ratler*, November term, 1841. Taney's Dec., 456.

[66] Leef v. Gardiner, November term, 1841. Taney's Dec., 461.

[67] Thomas v. Gittings, April term, 1844. Taney's Dec., 472.

paid other bills, taking a bottomry bond on the vessel from the master. When an action was brought by Gittings, the consignee, the District Court decided for him and, on appeal, Taney decided that a bottomry bond was allowable in this case, in the interest of both owner and master.

Supplies furnished at the home port create no lien upon a vessel[68] and the port where the vessel is enrolled and licensed is the home port, without regard to the citizenship of the owner. A vessel whose voyages are confined within the limits of the District where she is enrolled, for example a Baltimore boat which goes not outside of the Chesapeake Bay, though she may connect with other vessels, is not engaged in foreign voyages, so that the furnishing of necessities for her voyages is a maritime contract, or has connection with commerce on the high seas.

A promissory note,[69] given for articles furnished toward the repair of a vessel, will not bar an admiralty suit on the original cause of the action, when the libellant produces the note in court, and surrenders it.[70]

When a contract for repairs or supplies to a merchant ship, the steamboat *Susquehanna*, was made, the question as to whom credit was given, or who is liable for payment, is an admiralty one.[71] A contract to form a partnership in order to purchase a vessel is not a maritime one. If the contracts are so blended that the court cannot adjudicate one without the other, the complainant must resort to law, or equity, as the case

[68] Pickell v. Steamer *Loper*, April term, 1851. Taney's Dec., 500.

[69] McKim v. Kelsey, April term, 1851. Taney's Dec., 502.

[70] In the same case, Taney stated that consent of parties could not confer jurisdiction upon the court.

[71] Turner v. Beacham, April term, 1858. Taney's Dec., 583.

may require, and the Admiralty Court cannot take jurisdiction.

In a suit *in personam* to recover for work done for the schooner *Hamilton*,[72] Taney took the position that, although a promissory note was given for the debt and there was a common law remedy in consequence, yet there is not necessarily a bar to an Admiralty suit, for sometimes a man may elect his remedy. Whether the taking a note for a maritime contract constituted a bar to the admiralty proceeding or not, depended upon the effect which the note had upon the original contract. If it discharged the contract, there was an end of the admiralty jurisdiction. A surrender of the note, as was offered, could not renew the original debt. In Maryland, however, a due bill did not discharge an original contract. The vessel in question was a small one of 27 tons, used in transporting farm produce from the respondent's farms to Baltimore City. The manner in which the vessel is employed cannot affect the admiralty jurisdiction, which "depends upon the vessel's character." If the repairs fitted her for the navigation of the sea, the contract was maritime. "It did not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode, or trade, in which he afterwards employed her."[73]

Several cases dealt with claims for wages.[74] On a voyage to the West Indies, the captain broke a water bucket over a seaman's head. On his return to Balti-

[72] Ruppert v. Robinson, April term, 1851. Taney's Dec., 492.

[73] Taney's avoidance of technicalities is shown by his refusing to allow an amendment of the respondent, the only effect of which would be to drive the libellant to another forum to recover a claim admitted to be due.

[74] In Agnew v. Donnan, April term, 1838, Taney's Dec., 386, Taney held that the Circuit Court had no jurisdiction to consider an appeal, when the amount claimed was under $50.

more, the sailor requested his discharge.[75] The master could have refused, but granted it, and made the sailor sign a receipt for twenty-five cents, "for assault and battery, in full for all dues and demands." He then brought suit. Taney considered the amount grossly inadequate and to have been accepted when the sailor was under undue influence. The court allowed thirty dollars, without costs.[76]

The schooner *Baltimore*, bound from its home port to Bordeaux, and owned by Karthaus, an American citizen, was captured by a British cruiser in the war of 1812 within a mile of the coast of Spain, with which nation the United States were at peace.[77] The vessel was carried into a Spanish port and thence taken to Great Britain. The owner put in a claim for damages under the Florida Treaty of 1819 with Spain, on the ground that Spain had not fulfilled her obligations as a neutral, and, therefore, was bound to make restitution. He was allowed, for vessel and cargo and outward freight, an amount which fell far short of what he lost. The mate, Ardrey, was detained as a prisoner of war, until he was exchanged, and he returned to the United States, more than a year from the time he left, having earned no wages after leaving the vessel. He sued Karthaus to recover wages up to the date of his return to the United States. The decision was that wages were recoverable only to the day of the ship's condemnation, but that no deduction should be made from them, because of an insufficient sum received by the owner. "Freight is the

[75] Mitchell v. Pratt, April term, 1841. Taney's Dec., 441.

[76] The case of the Clerk's fees, April term, 1841, Taney's Dec., 453, was one in which reasonable fees for a seizure on land for a breach of revenue laws were held to be the same as for seizure of goods on rivers.

[77] Ardrey v. Karthaus, April term, 1836. Taney's Dec., 379.

mother of wages," except against underwriters—the public enemy forms no exception. "A neutral power[78] is not at liberty to decide according to her own convenience, whether she will perform her neutral obligations or not; she is bound to perform them, and, if she fails to do so, she becomes herself liable for the injury which she ought to have prevented." The Spanish had been derelict and the seamen had well grounded *spes recuperandi* which was not lost, until condemnation of the ship. The "freight and the ship itself, to the last plank, are liable for wages.[79] The claim of the seamen is a preferred one to be paid, without any deduction for the losses or expenses of the owners." The amount recovered exceeded the claim for wages, therefore, the libellant was entitled to them in full.

Concerning freight, Taney decided that a contract, created by signing a bill of lading for the carriage of goods from one port to another, is a maritime one and within the admiralty jurisdiction.[80] The owners of the ship *Charles*, in 1849, advertised that she would sail for San Francisco, but, being unable to secure a full cargo, the voyage was given up, and arrangements made with the ship *Andalusia*, to take over the freight. One of the shippers refused to accede to this arrangement, but insisted that the goods be carried in the *Charles*, or purchased from him at the invoice price, including expenses. The ship owners declined to do either thing, but deposited the goods in a warehouse, subject to the shipper's orders. The district court gave $100 and costs to the shipper, when a libel was filed and the libellants appealed from the decision. Taney held that it was clear that the ship was bound to carry the goods which had been accepted

[78] Page 383.
[79] Page 385.
[80] Harrison v. Stewart, April term, 1851. Taney's Dec., 485.

as freight, unless prevented by some uncontrollable event, and that the ship owners were liable to damages for breach of contract, since they had refused to perform the voyage without legal justification. The *Andalusia* was a ship equal in character and qualities to the *Charles*, and so there existed no just reason for awarding damages to the amount of the value of the goods, which were not lost, nor even detained without the owner's consent. The true measure of damages was the difference between the value of the goods at Baltimore and in San Francisco; for that was the loss occasioned by the breach of the contract. If the *Charles* had sailed in February, as advertised, and gone around Cape Horn, she could not have reached San Francisco before June. The testimony showed that the market there was then in a state of great depression and the goods might even have been sold at a loss, so that the decision of the District Court was affirmed.

Some Liverpool merchants filed a libel against the owner of the ship *A. Cheeseborough*,[81] on which wheat was shipped from Baltimore, alleging that a large part of the cargo had been lost on account of negligence. The defence was successfully made that, after a few days sail, a storm arose, and the ship sprang a leak, wheat came up with water in the pumps, and the ship finally went to the island of St. Thomas for repairs. Surveys were made there and showed that the cargo must be landed, some thrown away, some reladen, and some sold, as the cargo could not be repacked so closely. It had been loaded in bulk in Baltimore, and reloaded in bags in St. Thomas, and some tobacco which was also in the cargo could not be repacked so tightly. The libellants asserted that the disaster was due, not to the storm, but

[81] Hooper v. Rathbone, April term, 1853. Taney's Dec., 519.

to straining the ship through carrying too much sail, or to a defect in construction of the bin, or in the arrangement of the pumps. Taney did not agree with these contentions, and, saying that the conduct of the master was prudent, dismissed the libel with costs.

A vessel[82] set sail from New York to the West Indies, expecting afterwards to go to Franklin, Louisiana, and thence to Baltimore. The voyage ought usually to have been made in two months, but actually took seven, for the vessel was injured by a storm and was forced to refit at Nassau, so that she arrived late for the sugar season in Louisiana. After being notified that no cargo would be given him on account of that detention, the master of the vessel did not wait, but sailed for Baltimore. Claim was then made by the owners of the brig for damages, and Taney granted their suit, holding that they were entitled to recover at Common Law, the full amount of freight that they would have earned, if a cargo had been given them; but that, as Admiralty is equitable, the omission to give notice of the disaster which delayed the vessel so long beyond her time, evidently caused the inability to provide the cargo and must exercise a serious influence in estimating damages and throw upon the libellants a part of the loss. The master was to have part of the profits of the voyage, and, therefore, was an incompetent witness as to the necessity of the delay, nor did the fact that he had been disabled and employed a substitute make him competent, since the substitute had no share in the profits. The contract was a written one, and a custom to make a voyage for the sugar season could not be allowed to affect the legal construction of such a contract.[83]

[82] Hall v. Hurlbut, April term, 1858. Taney's Dec., 589.

[83] Taney differed from the English decision of Avery v. Bowden in 6 Ellis and Bl. 95, and refused to follow it.

The agent of the British barque *Invincible* entered into a charter party with a ship master to go from City Point, on the James River, with a cargo of flour to Rio de Janeiro and return with coffee to Baltimore.[84] Anderson shipped part of the flour in the cargo and Gittings advanced him money to enable him to do so. The voyage proved unfortunate, and the net proceeds of the flour did not pay Gittings' bill. Anderson failed, and owed the ship owners a large amount for freight. The ship master refused to deliver coffee put on board by Anderson's agents in Brazil, until the freight should be paid. There was no question of bad faith, but merely of the rights of the respective parties. If the coffee were the property of Anderson, and Gittings' interest was only a lien, the coffee would be liable to the whole amount of freight due as a prior lien, Taney held, but Gittings' interest was more than a lien, it was his property. Anderson had no right to possession, nor control of the cargo, unless a surplus remained, after satisfying the amount, to secure which the flour had been made deliverable to Gittings' order. The coffee had been purchased for Gittings and shipped to him, out of the proceeds of the flour. The lien of the ship owners upon the return cargo did not depend upon the funds with which it was purchased. Gittings was a mortgagee of the flour; but, to the extent of his interest, his rights stood on the same ground as if he had been a purchaser. If the coffee at Baltimore was worth more than the amount for which Anderson had assigned to Gittings, the surplus would be liable for the full freight, but there was no surplus, and, consequently, the shipment of coffee was

[84] Webb v. Anderson, April term, 1858. Taney's Dec., 504. The libel was filed by John Glenn, and he being appointed District Judge, by an especial act of Congress, the trial of the cause was assigned to Taney.

liable only to the freight from Rio de Janeiro. The charter party did not contain the usual clause, by which the owner binds the cargo to the performance of all covenants in the charter party, and, on the general principles of the law, the merchandise is bound for the transportation only and its liability can not be extended further, except by stipulations in the charter party.

The schooner *Anne*, and another vessel were built at Baltimore,[85] for a Portuguese merchant, residing in Cuba, under the superintendence of two men sent from Havana by him, who should command the schooners when they were finished. He placed a sum of money in the hands of his factor to pay for the vessels. When the *Anne* was ready for sea, she was registered as the factor's property. She was immediately seized by the collector of the port, under the act of 1818, as fitted out for the slave trade. It was proved at the trial that she was so fitted out with the factor's knowledge, and Taney held that, as he made out the contracts as factor, he must be so regarded, and not as owner. To work a forfeiture, a criminal intent must exist in the mind of the party lawfully entitled to direct the employment of the vessel. If the owner placed the vessel under a factor, who equipped her with an unlawful intent, the vessel is liable to forfeiture, so the claim of the Federal government was sustained.

The act of Congress of 1838 required steamboats to have their boilers and machinery examined every six months.[86] The steamer *Jewess* carried passengers and goods between Baltimore and Norfolk without such examination from December 8, 1838, until June 15, 1839, and was then seized by federal officials. The district

[85] Strohm v. U. S., April term, 1840. Taney's Dec., 413.

[86] Va. & Md. Steam Nav. Co. v. U. S., April term, 1840. Taney's Dec., 418.

court awarded a fine of $50 and decreed a sale of the boat to pay the fine. Taney, on appeal, upheld the decision that the law had been broken, since the examinations must not be more than six months apart, but held that the court below had erred, in putting the penalty against the owners, for that must be done by indictment in a criminal court, and not by suit in Admiralty. Showing his usual disregard of undue technicality, he proceeded to give such a decree as ought to have been given, and ordered the vessel sold and the proceeds distributed.

The barque *Anna*, from Bremen to Baltimore, took on board 235 passengers above six years old, of whom 231 were in the steerage. Twelve of the passengers died[87] on the voyage, and, when the barque came to Baltimore, the federal officials seized her, on the ground that she violated the statute concerning the transport of passengers.[88] Taney stated that it mattered not whether an excessive number had been brought into the United States, the law was violated if too many passengers were taken on board at the beginning of the voyage. The act was passed to prevent the evils of overcrowding and the court must interpret it in accordance with its spirit. He held that the facts showed that there were not too many passengers on board, and so decreed no forfeiture.

Taney had a particular interest in collisions, and one of his most important decisions, that of the *Genesee Chief*, arose out of a collision. Four decisions in such cases are reported among his Circuit Court opinions. The first of these concerned a collision in the Chesapeake

[87] Eleven persons died of cholera in the two months passage.

[88] U. S. v. Barque *Anna*, November term, 1854. Taney's Dec., 549. The Court held that the act of 1817 had been repealed by the act of 1848.

Bay, between the steamboats *Fredericksburg* and *Boston*.[89] As always in such cases, there was a conflict in the testimony, not from a desire to misrepresent, but from different points of view, different times at which the attention was called to danger, different degrees of coolness, of knowledge and of prejudice. Each steamboat was pulling a tow of canal boats, when the *Boston* ran into the *Fredericksburg*. Taney held that the former vessel was to blame, because she steered wrongly and her signal light was nearly out. The "omission of a known legal duty," Taney said, "is such strong evidence of negligence and carelessness that, in every collision under such circumstances," the offending vessel must be held at fault, unless there be "clear and indisputable evidence" to the contrary, As to the amount of damage, there was no equal contrariety of evidence. The witnesses were "skilful men and respectable citizens of undoubted integrity," but, when all were trustworthy, Taney was guided, not by their number, but rather by their knowledge and by the time when they examined the boat. The case came before him on appeal and he said that the District Court's decision should be regarded as correct, unless it was shown to be erroneous. "Only the firmest and clearest conviction that it had fallen into error would justify" a reversal, especially when the case was carefully considered below.

The brig *Mary T. Wilder* lay at anchor in the Chesapeake, in the ship channel, five miles below the Patapsco River, without lookout or light. The night was a moonlit one, but the moon went down a little before dawn, and just at that time, the barque *Phantom* collided with the brig. Taney held that the brig was guilty of gross negligence and that the want of a light on the *Phantom*

[89] Taylor v. Harwood, November term, 1845. Taney's Dec., 437.

did not constitute contributory negligence, since there was no one on board the brig awake to see it.[90]

The brig *Laurel* lay at anchor below Hampton Roads in the public channel five miles from land, on a dark night. She had proper signal lights, and so had a valid claim for damages, when the schooner *Adelaide* ran into her at 5 a.m., on a December morning, without seeing the lights until within 50 yards. The schooner showed unskilfulness in measures taken, when she became aware of the presence of the brig.[91]

Taney gave severe reprobation to a schooner loaded with oysters and bound from the Patuxent River for Philadelphia, when she ran into the steamer *Louisiana*, in the Chesapeake, near the mouth of the Rappahannock River[92] on a moonlight night. There was an incompetent lookout on the schooner. The helmsman was hardly better, and did not mind the lookout. The mate of the *Louisiana* was competent and he had a good helmsman, but the latter was a colored man and so, under the Maryland law of the period, could not be examined as a witness. If the schooner had been properly handled, the boats would have passed in safety.[93]

One more case remains to be considered—a peculiar one.[94] Four rafts of lumber, which had floated down the Susquehanna River and which belonged to Jacob Tome, were anchored at Port Deposit, below tide-

[90] Cohen v. Brig *Mary T. Wilder*. November term, 1856. Taney's Dec., 567.

[91] Green v. Schooner *Adelaide*, November term, 1857. Taney's Dec., 575.

[92] Haney v. Steamer *Louisiana*, November term, 1858. Taney's Dec., 602.

[93] Taney distinguished the case from the *Genesee Chief*, since the schooner here was entirely at fault. A steamboat carrying the mails, he added, has no exemption from the regular rules.

[94] Tome v. Four Cribs of Lumber, November term, 1853. Taney's Dec., 533.

water. They were driven from their anchorage by high winds and high water. The rafts were not broken up, but were rescued while floating, and brought to the opposite shore of the river. Taney held that no salvage was due and that the rescuer had no lien on the lumber, nor any right to retain it from the owner. His remedy against the owner was an action at law to recover the value of his services. Tome had sent men to carry away the lumber, when a man who lived on the Harford County side came out with others in a boat. Bearing a gun, he threatened to shoot Tome's men and frightened them away. Tome asked the Admiralty Court for the lumber and for damages, as he could not use it to fulfil a contract. Taney said the breaking away of the rafts was one of the usual accidents of trade, and that, if the owners chose to expose their property to this risk, no one can acquire a right in the lumber by interfering with it without their authority. No one was on the raft, but that fact did not make it a derelict, for usage did not require anyone to be there. The loss was occasioned rather by floods from the land, than by perils of the sea. These rafts are not "vehicles intended for navigation" of the sea, nor instruments of commerce or navigation, but are mere piles of lumber. Taney held that Tome ought to have sued out a writ of replevin in a court of law; but, with his usual reasonableness, stated that it would be unjust to deprive him of the possession, which the decision of the District Court had given him, "merely to subject him to the necessity of recovering it again in a new suit." As he mistakenly brought the controversy into the Court of Admiralty, however, he was given no costs.

CHAPTER XV

The Civil War (1861–1864)

The National election of 1860, at which Lincoln was chosen President, was almost immediately followed by the secession of South Carolina, and the Gulf States soon imitated her example. The "irrepressible conflict" had come to a point where the decision must be made as to whether the union of States should continue to exist one and indivisible, or should be riven into two confederacies. The attempt to save the Union *with* slavery, which Taney had made in the Dred Scott case, had forever failed. The attempt of the Free State men to destroy slavery was far as yet from success. Most men in the North realized, as did Lincoln, that the first duty of the time was to lend every effort toward the preservation of the National Government and not to permit the country to be divided into States, "discordant and belligerent." To many, the question of duty was a doubtful one. Allegiance could be given to one power only and, when a State voted to secede, a man of high integrity might hesitate, if he had professed fealty to that State. In Virginia, George H. Thomas and Robert E. Lee were both men of great conscientiousness, but their decisions as to this point were diametrically opposite. In Maryland, a border State, where the ties of friendship and kinship were close with Pennsylvania on the one side and with Virginia on the other, the two conflicting forces strove; on the one hand to carry the State over to the Confederacy, and on the other to retain her within the Union. The year of the Presidential canvass opened with five justices from the Slave States upon the Su-

preme Court Bench. Of these Daniel of Virginia died during 1860 and Campbell of Alabama went with his State when it seceded, albeit somewhat unwillingly.[1] Catron of Tennessee and Wayne of Georgia, remained loyal to the Union in spite of the secession of their States. Wayne was the senior of the Associate Justices, and, therefore, he presided over the Court during Taney's illness and after his death. Of the loyalty of Taney himself, there never seems to have been a question at the time. He took no open part in the discussion that raged about him, but his silent influence was thrown on the side of the Union.[2] Campbell, wrote at Fort Pulaski on July 10, 1865, that Taney, in his last interview with Campbell "acquiesced in the propriety" of the latter's resignation. On April 29, 1861, Campbell, informing Taney that he had resigned his judgeship, expressed in strong language "the profound impression that your eminent qualities as a magistrate and jurist have made upon me. I shall never forget the uprightness, fidelity, learning, thought, and labor that have been brought by you to the consideration of the judgments of the court, or the urbanity, gentleness, kindness, and tolerance that have distinguished your intercourse with the members of the court and bar. From your hands I have received all that I could have desired and in leaving the court, I carry with me feelings of mingled reverence, affection and gratitude."

[1] Southern Historical Society Papers. 52 Am. Law Rev. 162, Article by Judge H. G. Connor of North Carolina. See also Connor's Life of Campbell, pp. 140 and 149.

[2] On December 4, 1860, Senator Saulsbury of Delaware proposed the appointment of a commission to be composed of ex-President Millard Fillmore, ex-President Pierce, Chief Justice Taney, George M. Dallas, Edward Everett, Thomas Ewing, Reverdy Johnson, Horace Binney, J. J. Crittenden, and George C. Pugh, to confer with a like number of commissioners from the Confederate States, in the endeavor to restore peace and preserve the Union. (Moore's Rebellion Record, Vol. II, Doc. 103.)

On March 4, Lincoln took the oath of office, administered to him by Taney. He had now sworn in seven Presidents, a record which has not been equalled.[3] The bent and fragile figure of the aged jurist, clad in his black silk gown, standing beside the tall gaunt statesman, made a striking picture, which must have led bystanders to feel that the Chief Justice would hardly swear in another President, and, considering the condition of the country, to wonder whether another President would ever present himself to take the oath of office.

A little more than a month after Lincoln's inauguration, Fort Sumter fell and the the Sixth Massachusetts Regiment forced its way through the streets of Baltimore, on the nineteenth of April, struggling against a mob. For a time, the control of the city was in doubt, until General Benjamin F. Butler, with Union forces, seized Federal Hill, which commanded the centre of Baltimore, on the night of the thirteenth of May. All was excitement and the Union leaders felt that the Southern sympathizers must be sternly repressed. Lincoln authorized the suspension of the writ of *habeas corpus* in the cases of such persons and their arrest by military officers.

This suspension of the writ of *habeas corpus* brought Taney into a sharp conflict with the National Administration. He stood firmly for a strict adherence to the Constitution, as he interpreted it, and his stern courage prevented him from cringing for a moment. At 2.00 a.m. on May 25, 1861, John Merryman, a member of a prominent Baltimore County family, was arrested in his own home by a military force acting under orders of Major-General William H. Keim, commanding in

[3] Schouler, VI, p. 5.

the State of Pennsylvania, and was committed to the custody of General George Cadwalader, commanding at Fort McHenry, in Baltimore.[4] On the next day, Sunday, May 26, George Hawkins Williams, one of Merryman's counsel, went to Fort McHenry and had an interview with General Cadwalader, who refused to permit Williams to have, or to copy, or to read the paper under and by which Merryman was detained in custody.[5] Taney stated later than Merryman appeared to have been "arrested upon general charges of treason and *rebellion*" *without* giving the names of the witnesses. Upon the petition of Merryman, a writ of *habeas corpus* was then issued by Taney, sitting at chambers in Washington, addressed to the commandant of the fort, directing him to bring Merryman before the Chief Justice, in Baltimore, upon Monday. When the writ was taken to General Cadwalader he accepted service, but declined to produce Merryman. He sent Colonel Lee, his aide, who appeared in court, with regrets, giving as his excuse the reasons that the arrest was made,[6] "by the orders of the Major General commanding in Pennsylvania, upon the charge of treason, in being publicly associated with, and holding a commission as lieutenant in a company having in their possession arms belonging to the United States and avowing his purpose of armed hostility against the Government," and that the President of the United States had authorized General Cadwalader to "suspend the writ of *habeas corpus* for the public safety." General Cadwalader showed courtesy to Taney and sent by Colonel Lee a respectful letter to the Chief Justice,

[4] See Tyler, pp. 640 and ff.

[5] Tyler, p. 641

[6] Tyler, p. 421. 1 Moore's Rebellion Record Diary 82, Docs. 301, 2 Scharf's Maryland 430.

who had come to Baltimore.[7] He stated that Merryman had been arrested, without his knowledge nor direction, by Col. Samuel Yohe at General Keim's order, and had been brought to the fort by Colonel Yohe's order. Calwalader had been "informed that it can be clearly established that the prisoner had made often and unreserved declarations of his association" with an "organized force, as being in avowed hostility to the Government, and in readiness to coöperate with those engaged in the present rebellion against the Government of the United States." The officer's position was a difficult one and he felt that he must execute the "high and delicate trust" so that "in time of civil strife, errors, if any, should be on the side of the safety of the country." Yet he hoped that he and Taney could "coöperate in the present trying and painful position, in which our country is placed" and that they would not, "by any unnecessary want of confidence in each other, increase our embarrassments." He, therefore, requested that Taney would "postpone further action," until instructions could be received from President Lincoln. Taney, however, refused to delay, but he promptly issued an attachment against General Caldwalader for contempt and made the attachment returnable upon Tuesday. Washington Bonifant, the Marshal, took the writ to Fort McHenry and sent in his name at the outer gate. The sentry did not permit the marshal to enter and the messenger returned with the reply that there was no answer to the card. Upon receiving this information, Taney said that the "Marshal had the power to summon the *posse comitatus* to aid him in seizing and bringing before the Court the party named in the attachment;" but, "since the power

[7] Tyler, p. 643. 4 Nicolay and Hay 174.

refusing obedience was so notoriously superior to any the Marshal could command, he held that officer excused from doing anything more than he had done." The scene was a dramatic one. The infirm and aged Chief Justice sat on the bench surrounded by a group of interested auditors. The afternoon was a gloomy one and the low voice of Taney could scarcely be heard, so that the listeners gathered closer and closer around him, in order that they might understand what he said. Taney then stated that the detention of Merryman was unlawful[8] because: The "President, under the Consti-

[8] Tyler, p. 645. The following memorandum is of great interest:

"I was present at the hearing, in May, 1861, by Chief Justice Taney, of the Habeas Corpus case of John Merryman, who had been arrested for having taken part in the burning of the bridges over the Gunpowder and other streams (by direction of the Civil authorities), after 19 April, 1961, and who was confined at Fort McHenry, Baltimore.

"The hearing was in the United States Court Room, on the first floor of what was commonly called the 'Old Masonic Building,' on the East side of St. Paul Street, half way between Lexington and Fayette Streets.

"I remember very distinctly the Aide de Camp of General Cadwalder, who commanded at the Fort, in full uniform, with red sash and wearing his sword (and I remember wondering whether wearing a sword was proper in a Court Room), entering and coming up to the right of the seated Chief Justice (but not close to him). I was standing nearly between the two, and the scene is in my mind like a photograph.

"The officer said that General Cadwalder had directed him to say that the President of the United States had suspended the writ of Habeas Corpus, and, therefore, he could not produce John Merryman—or closely to that effect. And he then retired. The Chief Justice thereupon ordered the Clerk of the Court to issue a Writ of Attachment to bring General Cadwalader into Court, returnable next day.

"The next morning, at about 12 o'clock, I think, the Chief Justice took his seat, and called for a return to that writ. The United States Marshal stated that he had gone to Fort McHenry (the evening before?) but was refused admittance at the gate, and so had been unable to serve the writ. The Chief Justice, after a few words about the failure to obey the writ, proceeded: 'Under these circumstances, I might order the Marshal to summon a *posse comitatus*, but as it is notorious that it would be met by a superior force, I will not require it. In a few days, I will file a written opinion with the Clerk of the Court,

tution of the United States, *can not suspend the privilege of the writ of habeas corpus*, nor authorize a military officer to do it; (2) a military officer has no right to arrest and detain a person not subject to the rules and articles of war for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control, and, if the party is arrested by the military, it is the duty of the officer to deliver him over, immediately, to the civil authority, to be dealt with according to law." After this statement, Taney remarked that he would put his opinion in writing and file it in the office of the Clerk of the Circuit Court before the end of the week.

Accordingly, on June 1, the Chief Justice filed his famous opinion in the case of Ex parte Merryman.[9] For

and direct him to have a copy placed in the hands of the President of the United States, so that that high Officer may perform his Constitutional duty of seeing that the laws are enforced.' These were almost his exact words, if not identically the same.

"During both sittings he never varied from his manner of calm dignity.

"I have a distinct mental picture of the venerable Chief Justice, on one of these mornings, walking across the pavement into the Court House, leaning on the arm of his grandson, R. B. Taney Campbell, and passing through a crowd of respectful and sympathizing, but silent spectators.

McHenry Howard,
5 May, 1919."

"Major William M. Pegram, at the meeting of the Maryland Historical Society, in April, 1919, also gave an interesting account of this event, of which he was an eye-witness.

[9] Tyler, pp. 423, 646; Taney's Dec., 246, 9 American State Trials 880; Moore's Rebellion Record, I, Diary 92. In a letter to Conway Robinson, written on April 10, 1863, he stated that he had left out, in the composition of the opinion, two references he wished he had included, viz.: (1) that the Declaration of Independence stated that one reason for the revolt of the Colonies was that the King "has affected to render the military independent and superior to the civil power," and the Constitution was framed on the principles of the Declaration; and (2) that Thomas Mifflin, President of the Confederation Congress, when accepting the resignation of Washington's command of the army, at Annapolis in 1783, said to him: "You have conducted the great military contest

once, Tyler's grandiose manner is not one whit too grandiloquent in writing that "there is nothing more sublime in the acts of great magistrates that give dignity to governments, than this attempt of Chief Justice Taney to uphold the supremacy of the Constitution and the civil authority in the midst of arms." He recognized no truth in the maxim, "*Inter arma, silent leges,*" and he fearlessly performed his duty, though the aged jurist knew what peril he might incur, and remarked, as he left the house of his son in law, James Mason Campbell, that "it was likely he should be imprisoned in Fort McHenry before night; but that he was going to court to do his duty."[10] The opinion plainly stated that he "had supposed it to be one of the points of Constitutional Law, upon which there was no difference of opinion[11] and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by Act of

with wisdom and fortitude, invariably regarding the rights of the civil power through all disasters and changes." Taney closed his letter with the remark that Washington's conduct contrasted, "finely and nobly," with that of "the military men of the present day." (Tyler, p. 460.)

Biddle (Const. Hist., p. 193) speaks of the ex parte Merryman opinion as "this admirable expression of the law upon a subject involving the right of a freeman of protection against arbitrary arrest and punishment" and as "a fitting conclusion to the long and distinugished life of the Chief Justice." He criticises Binney's defence of Lincoln. Mikell (4 Gt. Am. Lawyers 188) enthusiastically wrote that there is "no sublimer picture in our history than this of the aged Chief Justice—the fires of Civil War kindling around him, . . . serene and unafraid, while, for the third time in his career, the storm of partisan fury broke over his devoted head."

[10] Tyler, p. 427. Tyler's suggestion that the scene should be perpetuated in a painting has never been carried out, but I hope that it may yet appear among the mural decorations of the Baltimore Court House. Geo. T. Curtis (B. R. Curtis's Life I 240) spoke of the opinion in ex parte Merryman as a "noble Vindication of the writ of Habeas Corpus," which will command the admiration and gratitude of every lover of constitutional liberty, as long as our institutions shall endure."

[11] Tyler, p. 647.

Congress." He commented upon the fact that "no official notice" had been "given to the courts of justice, or to the public, by proclamation or otherwise," that the President claimed this power. Reference was made to Jefferson's request to Congress, at the time of Burr's conspiracy, to determine whether the public required the suspension of the writ and then Taney boldly flung down the gauntlet, saying that he believed "that the President has exercised a power which he does not possess under the Constitution." The respect which Taney held for the high office that Lincoln filled required a plain and full statement of the grounds of the Chief Justice's opinion, so as to show that the legality of the President's act was questioned, after "a careful and deliberate examination of the whole subject."

The clause of the Constitution, which authorizes the suspension of the privilege of the writ of *habeas corpus* is in the ninth section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. After the grant of powers to Congress, the Constitution guards "certain great cardinal principles, essential to the liberty of the citizens, and to the rights and equality of the States by denying to Congress, any power of legislation over them, which might have been "attempted, under the pretext that it was necessary and proper to carry into execution the powers granted." "The great importance which the framers of the Constitution attached to the writ of *habeas corpus* to protect the liberty of the citizens is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers—and even in these cases, the power is denied, and its exercise prohibited, unless the public safety shall re-

quire it." Congress may, in truth, judge conclusively, as to the requirement of the public safety. "but the introduction of these words is a standing admonition to the legislative body of the danger of suspending" the writ.

It is the second article of the Constitution, Taney continued, that provides "for the organization of the executive department and enumerates the powers conferred upon it and prescribes its duties. And if the high power over the liberty of the citizen, now claimed, was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of this power." The article carefully limits his authority and his powers, in relation to the civil duties, as well as those belonging to his military character. "He may not even arrest any one charged with an offence against the United States," in Taney's opinion, "nor can he authorize any officer, civil or military, to exercise this power," for the fifth article of the Amendments to the Constitution expressly provides that no person "shall be deprived of life, liberty, or property without due process of law—that is judicial process." Even if Congress suspended the privilege of the writ of *habeas corpus* and a "person, not subject to the rules and articles of war, was afterwards arrested and imprisoned by regular judicial process," Taney held, that "he could not be detained in prison, or brought to trial before a military tribunal," without violation of the Sixth Amendment, assuring the accused the right to a public jury trial.

The President's only power, where "the life, liberty, or property" of a private citizen are concerned, in Taney's view, was that given him in the third section of

the second article, "which requires that he shall take care that the laws shall be faithfully executed." That clause meant that "he is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself; but he is to take care that they faithfully carried into execution, as they are expounded and adjudged by the coördinate branch of the Government, to which that duty is assigned by the Constitution." In other words, in exercising this power, the President acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.[12]

Taney believed that these "provisions in the Constitution" were "expressed in language too clear to be misunderstood by anyone" and that they

left no ground whatever for supposing that the President, in any emergency or in any state of things, can authorise the suspension of the privilege of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessity of government for self defence, in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution.

[12] The inconsistency of this position with that taken by Taney's friend, Andrew Jackson, in the Cherokee Cases, can not escape any reader who recalls the period of Jackson's presidency. Taney's view here is far at variance with that of the man who said, "John Marshall has made his decision, now let him enforce it." At that moment, a stirring blast upon Taney's bugle horn would have been worth a thousand men, but he gave no encouragement to the forces of union and in the minds of his friends, the Perine family, he left the impression that he sympathized with seccssion. This impression may not have been correct, but Taney was blameworthy in so acting as to leave this impression.

After a somewhat extended account of the experience of England with the writ of *habeas corpus* under the Stuarts, which account Taney drew from Blackstone and Hallam and which he gave, because he maintained that the provision in the Fifth Amendment was "nothing more than a copy of the like provision in the English Constitution," he turned to American precedents and found them easily. Story's Commentaries[13] and Marshall's opinion in Ex parte Bollman and Swarthwout[14] distinctly placed the power to suspend the writ in the hands of Congress.

Taney could not forget that the suspension of the writ was not the only point involved, but he foreshadowed the ground later taken by the Court, forbidding the establishment of military law, when the Civil Courts were available,[15] and he insisted that, up to the time of Merryman's arrest, "there had never been the slightest resistance, or obstruction, to the process of any Court, or Judicial officer of the United States in Maryland, except by the military authority." Therefore, the military officer, who "had reason to believe" that Merryman "had committed any offence against the laws of the United States," ought to have gone to the proper legal authorities and followed the ordinary course of the law.

If the authority confided by the Constitution to the judiciary may, "under any circumstances, be usurped by the military power at its discretion, the people of

[13] III Sec. 1336.

[14] 4 Cranch 95.

Willoughby (Supreme Court, p. 75) wrote that "when President Lincoln refused obedience to Taney's decision in the Merryman case, he acted in an unconstitutional manner." The "dilemma in which Lincoln was placed was the result of a form of government with limited powers."

[15] Ex parte Milligan.

the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer, in whose military district he may happen to be found." Such was the hard dilemma, which Taney placed before the country. He had exercised all his power, but that power had "been resisted by a force too strong" for him to overcome. He could only order that the proceedings be filed in the Circuit Court and that a copy be sent to the President, in the hope that "the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him."

"The natural strength" of the aged jurist's intellect had not been abated, when he penned this opinion. For forcibleness, perspicacity, and convincing logic, it was not exceeded by anything he ever wrote. Undoubtedly, Taney was legally right and Lincoln was legally wrong. Undoubtedly, Lincoln's course was dangerous and, if acquiesced in, might well have been a detrimental precedent in the time of a less scrupulous and less devoted successor. Yet the reader must regret that the Chief Justice showed in his words, no appreciation of the facts that the life of the country was at stake in those days and that to Lincoln much was to be forgiven because he loved much. The occasion offered Taney a magnificent opportunity to give men a clarion call to patriotic fulfilment of their Constitutional duties and to personal services to secure the preservation of the Union. The opinion is the product of the mind of a lawyer, not of that of a statesman, of a man who loved his country, but whose love was encrusted in legality. Taney sent a copy of the opinion to Lincoln, who apparently took no notice of it, a fact which must cause

regret as a blemish in the character of the great President. Merryman was finally released without trial[16] and a fierce war of pamphlets arose over the question of his arrest and detention. Lincoln's position found its chief support in a pamphlet entitled "the Privilege of the Writ of Habeas Corpus" by the great Philadelphia lawyer, Horace Binney. Taney's position found its leading advocate in his former associate on the Supreme Court Bench, Judge Benjamin R. Curtis.[17]

Lincoln felt that he should defend his position[18] and, in the original draft of his message to Congress at the following session, wrote:

> In my opinion, I violated no law. The provision of the Constitution that the privilege of the writ of *Habeas Corpus* shall not be suspended unless, when in cases of rebellion of invasion, the public safety may require it, is equivalent to a provision—is a provision that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it. I decided that we have a case of rebellion and that the public safety does require the qualified suspension of the writ of Habeas Corpus, which I authorized to be made. Now, it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, I cannot bring myself to believe that the framers of that instrument intended that, in every case, the danger should run its course, until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.

[16] 3 Scharf's Md. 430.

[17] Life of Curtis, I, p. 350 and p. 459. S. S. Nicholas of Kentucky in a separate pamphlet and R. L. Buck in the Danville Quarterly Review for December, 1861, also warmly upheld Taney's contention.

[18] 4 Nicolay and Hay 176. See 6 Richardson's Messages and Papers of the Presidents 25 for final form.

Lincoln's logic is not convincing and has not convinced the American people. Congress by statute[19] vested the right of suspending the writ of *habeas corpus* in the President and that Statute impliedly asserted that the power to authorize such suspension was placed in itself alone. Winthrop, in his "Military Law"[20] sums up the whole matter, by saying that Taney's "ruling has been concurred in by a series of decisions in the United States and State Courts and by other recognized authorities."

A curious sequel to this incident occurred in the Confederate States. Alexander H. Stephens, Vice President of the Confederacy, was bitterly opposed, during the latter part of 1864, to the attempts of Jefferson Davis to act in the same way as Lincoln had done. On December 5, he wrote his brother, Linton, from Richmond, that he had read Taney's opinion on the preceding day. "It is a great paper, I will try to have it reprinted in Georgia. It sets at naught the prevailing opinions here on the power of Congress over this great writ of right,"[21] and on Christmas Eve, with the same purpose, he went to the *Whig* office and offered the proprietors $250, if they would republish Taney's decision.[22]

When he wrote his "Constitutional View of the War," some years later, he had not changed his high opinion of the value of Taney's opinion, the text of which he printed in an appendix to the book. "In the decision," he wrote, "will be found those vital principles of our federal compact—made for war as well as for peace—

[19] Act of 1813, chapter 81.

[20] Pages 53–57.

[21] Johnston and Browne's "Life of Stephens," p. 475.

[22] Life of Stephens, p. 476.

which should ever be the guide of all in authority, whether in the civil or military service, and which will remain forever to be studied and cherished by every true friend of the Constitutional Liberty in this Country."[23]

Taney's bitterness against the action of the President was so great that when his wife's grandnephew, McHenry Howard, came to bid him goodbye before starting South to enlist in the Confederate Army, two or three days before June 1, Taney said to the young man: "The circumstances under which you are going are not unlike those under which your grandfather (Col. John Eager Howard) went into the Revolutionary War."

Yet, Taney's detachment from partisanship was such that he left the impression on his ardent young relative that "he held to his lofty ideal of being at the head of one of the three great coördinate departments of government under the Constitution, and confined himself to his duties in that high office."

Taney's own view upon secession and the proper policy to be pursued toward the sister States, was that it were better to permit the South to depart from the Union, as he showed in a letter he wrote ex-President Franklin Pierce from Washington, on June 12, 1861, in answer to one from Pierce expressing approval of the opinion in the Merryman case.[24]

His sentiments were expressed nowhere else in writing, as far as I know, and are so important that they should be reproduced in full. Taney wrote:

> Your cordial approbation of my decision in the case of the *habeas corpus* has given me sincere pleasure. In the present

[23] Vol. II, p. 414.

[24] The letter is printed in 10 Am. Hist. Rev. 368.

state of the public mind, inflamed with passion and seeking to accomplish its object by force of arms, I was sensible of the grave responsibility which the case of John Merryman cast upon me. But my duty was plain—and that duty required me to meet the question directly and firmly, without evasion—whatever might be the consequences to myself.

The paroxysm of passion into which the country has suddenly been thrown, appears to me to amount almost to delirium. I hope that it is too violent to last long, and that calmer and more sober thoughts will soon take its place; and that the North, as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which, end as it may, will prove ruinous to the victors as well as the vanquished. But at present, I grieve to say, passion and hate sweep everything before them.

The Merryman case was not the only thing which troubled Taney at this time. He had invested his "very small fortune," entirely, in Virginia state stock.[25] After he removed from Baltimore to Washington, he appointed a friend, Mr. D. M. Perine, as his attorney in fact, to collect the interest through the Union Bank, where Taney still kept his account. In the latter part of June 1861, Mr. Perine sent the order for its payment as usual and had it returned to him unpaid, on account of a law recently passed by Virginia, forbidding the "payment of dividends to stockholders in the non-seceding States." A few days later, the Union Bank received a letter from its Richmond correspondent requesting the return of the order and stating that an attempt would be made to have the interest paid. Mr. Perine wrote Taney to ask his opinion and, on July 18,

[25] Tyler, pp. 479–482.

Taney replied from Washington, refusing to consent that any steps be taken to collect the money. He wrote his friend:

I cannot receive the money. It is true it is due to me from the State; but . . . . if mine is paid, it is a matter of favor and not of right, under the existing law of the State. If I were a private individual, I would accept it; but, in my official position and in the present posture of public affairs, I cannot consent to an exception in my favor, when other stockholders in Maryland are refused one.

I am sensible that this proposition has arisen from the personal kindness of friends in Richmond, who know that public life has not enriched me; and I am very sure that it never entered their minds that anyone would suspect them of unworthy motives in offering, or me in receiving it. But yet I think the offer was made inadvertently and under the impulses of kind feelings which prevented them from looking at the interpretation which baser minds might put upon the offer. Malignity would not fail to impute unworthy motives to them and me, and in the present frenzied state of the public mind, men, who do not know my Virginia friends or me, would be ready to believe it.

The letter is one of a high-toned, upright gentleman, but the loss of the income must have tried Taney sorely.

In December, 1861, the Supreme Court met as usual, there being two vacancies on the Bench. Taney was ill a great part of the term and yet he took an active part in the work of the tribunal. Justice McLean had died and Taney delivered a brief eulogy over him.[26] He also delivered a number of short opinions upon matters of practice, as was his wont.[27] He held that to

[26] 1 Black 12.

[27] (1) Brown v. Hart, 1 Black 38, Writ of error and service of citation on lawyer; (2) Wabash and Erie Canal v. Beers, 1 Black 54, finality of decree of Circuit Court; (3) Hecker v. Fowler, 1 Black 95, writ of error not on record;

have a review of the action of a State Court on the ground of violation of the State Constitution the point must have been raised in the Court below.[28] In other cases, he decided that it was not negligence to present on Monday for payment, a check drawn on Saturday;[29] and that, though a corporation is not a citizen within the meaning of the Constitution, yet there was a legal presumption that its members are citizens of the State in which the corporation had its legal existence.[30] He refused to grant a writ of prohibition against the execution of the penalty of death imposed upon a man for engaging in the African slave trade, which had been declared to be piracy,[31] In two cases, he discussed the limits of the admiralty jurisdiction,[32] holding that, while the Court had never regarded the federal admiralty powers restricted to those used in England, yet it did not claim all civil law powers for admiralty courts.

The year of 1862 wore away, with its unsuccessful Peninsular Campaign in Virginia of the Army of the Potomac under McClellan and the unsuccessful Maryland campaign of the Army of Northern Virginia under Lee. Lincoln filled the vacancies in the Supreme Court by the appointment of two Union men, Justices Clifford and Field. The Session of the Supreme Court, which opened in December 1862, was the last at which Taney presided. His health was clearly failing and he

(4) U. S. v. Knight, 1 Black 488, procedure as to reopening a case concerning land ownership in California; (5) Maguire v. Tyler, 1 Black 195. He dissented (p. 203) in a case involving a Louisiana land title, as he thought there was no jurisdiction.

[28] Farney v. Towle, 1 Black 350; Hoyt v. Sheldon, 1 Black 516.

[29] Brown v. Hart, 1 Black 38.

[30] Ohio & Miss. R. R. v. Wheeler, 1 Black 286.

[31] Ex parte Gordon, 1 Black 503.

[32] Bags of Linseed, 1 Black 108; Steamer St. Lawrence, 1 Black 522.

delivered only three opinions at that term and these were brief and in unimportant suits.[33]

The most important event of this term in which Taney took active part was the decision of the Prize Cases, which involved the question as to whether Civil War existed before Congress declared it on July 13, 1861, and, consequently, whether Lincoln had the right to blockade the coasts of the Confederate States prior to that time.[34]

Richard H. Dana wrote that it was a "difficult and delicate task" to satisfy the Supreme Court that the executive had possessed this right, without "weakening a claim to treat the Confederates as rebels," and that there was a common belief that the Court at the outset "was inclined to very different views, some even doubting the right to use force against the rebels." The decision was in favor of the lawfulness of Lincoln's establishment of the blockade; but Taney joined with Justices Catron and Clifford, in agreeing with Justice Grier's dissenting opinion, and the decision was made by the narrow majority of one.

During the sitting of the Court, Justice Wayne wrote Taney, suggesting that the Justices call upon the President, on New Year's Day, 1862. Too great bitterness had entered Taney's soul to permit him to do this and he briefly responded that he expected to have

[33] (1) Callan v. May, 2 Black 543, concerning real estate in the District of Columbia. He held that the allowance of an appeal does not show that the judge granting it thought the appellant was right. (2) Congdon v. Goodman, 2 Black 574. The controversy was held to be not a Federal but State one. (3) De Kraft v. Barney, 2 Black 714, another case from the District of Columbia Court. Jurisdiction must come through money involved, or a right the value of which may be calculated in money, not through a guardianship of the person and property of children.

[34] See T. K. Lothrop's Charles Francis Adams, vol. II, p. 414. 2 Black 635.

guests on that day and, besides, that he knew of no binding custom which should cause it to be necessary for the justices to make such a call.[35]

In February 1863[36] Taney wrote the Secretary of the Treasury a powerful protest against the levy of an income tax of three per centum upon the salaries of federal judges. He appealed to the Constitutional provision that the compensation of the judges "shall not be diminished during their continuance in office" and, properly, claimed that the tax was such a diminution. This provision of the Constitution is not only plain, but is one of the "most important and essential" ones. "The articles, which limit the powers of the Legislative and Executive branches of the Government," Taney wrote, "and those which provide safeguards for the protection of the citizen in his person and property, would be of little value, without a Judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement, warp their judgments."

He spoke thus of the matter:

> The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth and are of a character that requires it to be perfectly independent of the other departments. And in order to place it beyond the reach, and even above the suspicion of any such influence, the power to reduce their compensation is especially withheld from Congress and excepted from their power of legislation.

Although the act was in so far "unconstitutional and void," there was no way to bring the matter before the

[35] 13 Md. Hist. Mag. 167.

[36] Tyler, 432.

Secretary except by letter, for no judicial proceeding upon this question could with propriety be heard and decided by any judge, since all had an interest in it. Taney was unwilling to "leave it to be inferred," from his silence, that he admitted or acquiesced in the right of the Legislature to diminish, in any way, the salaries of judges. "Having been honored with the highest judicial station under the Constitution," Taney continued, "I feel it to be the more especially my duty to uphold and maintain the constitutional rights of that department of the Government, and not by any act or word of mine, have it supposed that I acquiesce in a measure that displaces it from the independent position assigned to it by the statesmen who framed the Constitution." He requested that the protest be placed on the public files of the Treasury Department. The Secretary, Salmon P. Chase, who afterwards succeeded Taney as Chief Justice, took no notice of this letter and, after waiting for several weeks, Taney, with the assent of his fellow Justices, had the letter entered on the Court's records.

Taney was unquestionably right in his contention and, in April, 1872, the Treasury Department changed its practice and ceased to deduct any part of the Judges' salaries.

About this time, must be dated two manuscript opinions which are in the New York Public Library. One dealt with paper money and the possibility of Congress making it, by enactment, a legal tender for the payment of debts. Taney denied the power to do this, as it was neither granted in express terms, nor incident to a power conferred, nor necessary and proper to carry out such a power. The power to emit bills of credit had been denied to the States and was not con-

ferred on Congress. Congress had power to fix the value of foreign coin, to prevent States from making such coin a legal tender at an exaggerated value; to coin money, that is to stamp marks of value on bits of metal; and to borrow from willing lenders; but these powers are far different from the power to clothe paper money with the qualities of legal tender.

The other opinion was against the constitutionality of the conscription law. The Confederacy which existed prior to the Constitution was a mere league of independent States. Under the Constitution, a line of division was marked out and each government was independent of the other in the sphere assigned to it. "Neither owes allegiance to, or is inferior to the other," Taney continued. "The citizen owes allegiance to the general government to the extent of the powers conferred on it, and no further, and he owes equal allegiance to the State, to the extent of the sovereign power they reserved." He shows in his discussion, the old fatal dualism, the old failure to distinguish between fealty and allegiance, the old refusal to acknowledge that no man can serve two masters. Neither government, in Taney's view, "could lawfully afford protection to the citizens beyond the limits of their respective powers, no allegiance can be claimed or is due, from the citizen to either government beyond those limits." It is a divided allegiance.[37] The "sovereignty of the general government is not a general and pervading one" and "the sovereignty of the State, to the extent of the reserved powers, is wholly independent of the general government."[38] Congress may raise armies exclusively under federal control, but these

[37] He cited Ableman v. Booth to prove this statement.

[38] He cited the 11th Amendment to the United States Constitution to prove this.

national forces must be volunteer. If conscription is constitutional, the militia of the States is absorbed in the army. Great Britain raised her armies by volunteering and such was the contemporaneous interpretation of the power given Congress. The war power of the federal government is as clearly defined in the Constitution as is the peace one. Under any other interpretation, the government created by the Constitution is put aside and a temporary one is installed in its place. The State has the sole right to enlist the militia, yet, under the conscription law, the Federal Government can disorganize the States, as their officers are not exempted, though Federal officers are. Taney added, "I speak of the Constitutional and lawful powers, not of the physical power which the Constitution had placed in the hands of federal government." The "Federal government pervades the whole nation and is supreme in its field, but it is limited" in its sphere. "The State sovereignty preserves tranquillity in the State, and guards the life, liberty and property of the individual citizen and protects him in his home and in his ordinary business pursuits."[39]

An interesting light on Taney's character is afforded in connection with the working of the draft.[40] His negro body servant Madison, who had waited upon Taney so long as to become indispensable to the Chief Justice in his extreme old age, was drafted. Taney's physician. Dr. Grafton Tyler, had long known that Madison had organic disease of the heart and was, therefore, disqualified. Taney also knew it; but when Dr. Tyler

[39] The Supreme Court, in the December Term 1917, decided that the Draft Law of 1917 was constitutional in the case of Arves v. U. S., 38 Sup. Ct. Rep. 159.

[40] Tyler, p. 482.

proposed to make an affidavit to that effect, the old Roman refused to permit the servant to be so excused, but paid $100 for a substitute for him.

Taney's last official duties were performed in connection with the Spring Term of Court in Baltimore, in 1863. In May, one Carpenter came before him there. For failing to obtain a permit prescribed for trade in Maryland, Carpenter's goods had been seized. Taney held that these executive regulations were void, and the acts done thereunder were illegal. He maintained[41] "if these regulations had been made directly by Congress, they could not be sanctioned by a court of justice whose duty it is to administer the law according to the Constitution of the United States." There was no doubt, but that "the United States have no right to interfere with the internal and domestic trade of a State. . . . . Undoubtedly, the United States authorities may take proper measures to prevent trade or intercourse with the enemy."

Nevertheless, "a civil war or any other war, does not enlarge the powers of the Federal Government over the States or the people beyond what the compact has, given to it in time of war. . . . . Nor does a civil war, or any other war, absolve the judicial department from the duty of maintaining, with an even and firm hand, the rights and powers of the Federal Government and of the States, and of the citizens, as they are written in the Constitution, which every judge is sworn to support." The aged justice, again, insisted against the truth of the saying: "*inter arma, leges silent.*"

The last decision which is known to have been given by Taney was one in the Circuit Court at Baltimore, on June 3, 1863, in the case of "The Claimants of a

[41] Appleton's American Annual Cyclopedia, 1863, p. 202.

large lot of merchandise versus the United States."[42] The goods had been seized by the Provost Marshal in October, 1862, after the persons from whom they had been taken, had "been seduced and betrayed into the purchase of the goods by the Provost Marshal's officers," as Taney bluntly put the matter. The agent of the Provost Marshal had wormed himself into the confidence of the family of one of the owners of the goods, had exhibited forged permits and clearances, had placed in the carpet bag of his supposed associate letters addressed to persons residing in the South, and had induced him to load the goods on a schooner with the view of carrying them from North Point on the Patapsco River to Virginia. The agent went with him, until the vessel was overhauled and stopped by a Federal tugboat. Taney "could recall no similar case in the jurisprudence of this country or England." He "could see no possible benefit to accrue to the government from such a seizure that would, in any way, compare with the great evil that would arise from a court of justice countenancing such conduct by a condemnation of the goods. It would encourage officers to betray the weak and imprudent into all sorts of violation of law and would be demoralizing, in the extreme, to the officers themselves." He was at a "loss to see how any court of justice could condemn property under the circumstances of this seizure, unless the means employed be also countenanced." The parties who claimed the goods came "from the South and, perhaps, intended to return on the first favorable opportunity;" but they had not engaged in any illicit trade previously and the goods "were not of a hostile character, tending to aid or arm those in rebellion against the government." In his

[42] Tyler, p. 436.

fierce indignation, Taney denied that the goods were, "at the time of the seizure, proceeding from Baltimore to Virginia. The claimants may have desired to carry them there and may have thought they were going there," but "the substantial fact is"—and after that fact Taney ever sought—"that they were going to Marshal McPhail's office." The law required that both the goods and the vessel carrying them be forfeited, and this "vessel belonged to the Government officers!" He summed up the case, by saying that vessel and "goods were, although unknown to the claimants, in the custody and control of the Government officers all the time, and cannot be condemned under the libel in this case, even though the Court should overlook the immorality of the proceedings and look only at the case in its legal aspect." The goods, or their appraised value, were ordered to be returned to the claimants. As Taney said there was no probable cause for the seizure, the Marshal had to pay the "damages and costs sustained by the claimants." Tyler rightly styles these acts of the Federal officers as "vile practices," and this and other instances of these practices did much to cause a large part of the people of Maryland, for a whole generation, to feel hostility to the Republican party, which was in control of the Federal Government during the Civil War.

There was a pleasant side to Taney's life, even during the troublous days of the war. Yearly, on his birthday, he received a letter of compliment from the Judges of the Court of Appeals of Maryland, which he acknowledged with the more pleasure, because he considered that, whatever of merit he had achieved, he owed to his "training in the Maryland Courts and the Maryland Bar."[43]

[43] Tyler, p. 449.

A few old friends were still left and to one of them, Mr. Justice James S. Morsell of the Circuit Court of the District of Columbia, Taney sent a photograph, as a token of friendship, in the spring of 1863.[44] The recipient was the last of the friends of Taney's youth in Calvert County, who "were remembered with great warmth of affection" by him. Judge Morsell was the older of the two. "They were born in the same neighborhood and were playmates, hunting wild game in the woods, and fishing and bathing in the streams and rivers of their native county," and were linked together "by their youthful joys," as Tyler writes, "in an enduring friendship." Morsell, in his note of acknowledgment of the photograph, referred to the "highly prized, early, and long continued friendship," between them.

His relations with the officers of the Supreme Court were very pleasant, so that Tyler wrote, some seven years after Taney's death, in his somewhat florid style, that "his very name warms their hearts and brightens their countenances. . . . . Such was the charm of his manner that every newly appointed officer, was, at his very first interview, brought to regard him with affectionate reverence." As a proof of this fact, Tyler quoted Ward Lamon,[45] who had been appointed Marshal of the Court by President Lincoln, as saying: "Chief Justice Taney was the greatest and best man I ever saw. I never went into his presence on business that his gracious courtesy and kind consideration did not make me feel that I was a better man for being in his presence." So too Mr. Meehan, the Librarian of the Court, exclaimed: "What a glorious old gentleman the Chief Justice is! He always treats me in such a way as to

[44] Tyler, p. 450.
[45] Page 448.

increase my respect for myself." Tyler's remark upon these speeches is that there was a notable combination in Taney of "such an iron will, such a determined purpose, such undaunted courage, and all the heroic elements of character," with "such a delicate sentiment of kindness, manifested in his courtesy." The biographer found the "source" in "his charity of heart and his high breeding."

Not only the officers, but also the Associate Justices of the Supreme Court venerated him. On his eighty-seventh, and last birthday, in March, 1864, when he was detained at his home by indisposition, he was waited upon, in a body, by his brethren, who paid their respects officially to him and "tendered him their congratulations on the returning anniversary of his birthdays." Mr. Justice Wayne, who presided in Taney's absence over the Court, adjourned the session early to make this visit with his associates and, after they left the house, the officers of the Court with several members of the Bar and a few friends waited on Taney, who received them with "urbanity and affability."[46]

Taney's friend, Severn Teackle Wallis, who was afterwards his eulogist, wrote him annually from Baltimore on these birthdays and always received appreciative replies from the aged judge.[47] In 1863, after thanking Wallis for his sincere and cordial approval of his conduct and praising Wallis for his course of opposition to the National authorities which had led to an incarceration in Fort Warren, from which Wallis had just been released, Taney's gloomy feelings led him to continue: "At my advanced age, I can hardly hope to see the end of the evil times on which we have fallen.

[46] Tyler, p. 455.

[47] Tyler, pp. 458, 459.

But I trust you will live to see the civil power restored in Maryland to its supremacy over the military and the homes and firesides of its citizens once more safe under the protection and guardianship of law." A year later Taney's gloom had deepened, yet curiously enough, he never quite lost hope of the Republic and so he wrote:

> I have not only outlived the friends and companions of my early life; but, I fear, I have outlived the Government of which they were so justly proud, and which has conferred so many blessings upon us. The times are dark with evil omens and seem to grow darker every day. At my time of life, I cannot expect to live long enough to see these evil days pass away; yet I will indulge the hope that you, who are so much younger, may live to see order and law once more return, and live long enough to enjoy their blessings.

After all, there was an ineradicable root of Federalism in the man and his hope for Wallis found abundant fulfillment, for the latter lived until 1894.

Another Baltimore friend, David M. Perine, also corresponded with him and, from time to time, entertained him at his country seat near Baltimore. On the eve of his birthday in 1862, Taney wrote Perine[48] and in the letter, with great piety, expressed his "gratitude to the Giver of all good, that I have been so long spared to those I love and that age has not been without true and tried friends to comfort and solace it. And among the foremost in that number, I need not say how sensible I am of your constant and unwearied friendship for now nearly forty years, and never forget the proofs you have given of it, in the darkest and most sorrowful scenes of my long life." He had been saddened by the misery which had so suddenly come upon the United States; but, though he saw no immediate hope

[48] Tyler, p. 452.

of an improvement in affairs, he serenely continued: "God's will be done; and we must meet it with the best faith of Christians and the firmness and courage of manhood."

A year and a half later,[49] his letter to Perine was still gloomier. He never recovered from the slight put upon the Judiciary by the disregard of his opinion in the Merryman case, and the downfall of slavery, or the brightening prospect of Union success came but little into his vision when he wrote. He had been very ill and had suffered from the depression which naturally comes to an ill man, especially an aged one. He was again in his office, but had not left his home. He felt as "well as usual, but not so strong" as before his illness. During the hot season, he wrote that he had "often thought of the pleasant days I have passed at your house, enjoying the fresh country air and walking over your grounds. But my walking days are over." He had no thought however, of resigning his position and hoped to "linger along to the next term of the Supreme Court. Yet very different, however, that Court will now be from the Court as I have heretofore known it. Nor do I seen any ground for hope that it will ever again be restored to the authority and rank which the Constitution intended to confer upon it. The supremacy of the military power over the civil seems to be established; and the public mind has acquiesced in it and sanctioned it. We can pray for better times and submit with resignation to the chastisement which it may please God to inflict upon us." His prognostications as to the future of the Supreme Court were fortunately untrue and the next generation saw that tribunal restored to its pristine position of dignity and influence.

[49] On August 6, 1863, Tyler, p 454.

When his eighty-seventh birthday came, he wrote Perine, thanking him for his letter and, with more cheerfulness, told him that: "At the age of eighty-seven, I cannot hope to see many more birthdays in this world and can hardly hope to live long enough to see more peaceful and happier times. You I trust, who are so much younger than I am, will be spared to see and enjoy them."[50] Mr. Perine's son, Mr. E. Glenn Perine, sent him a carved walnut cigar box as a birthday gift in 1864, and Taney's graceful note of thanks—a model of such an epistle, told the donor that Taney "took much pleasure in showing your birthday present to the Judges of the Supreme Court and other friends, who did me the honor of paying me a birthday visit, and having its beauty and taste admired by them all." His courtesy and thoughtfulness thus lasted until the very end of his life.[51]

Several months later, on June 24, 1864, he sent his photograph to his niece, Mrs. Alice Key Pendleton, wife of Hon. George H. Pendleton, together with a graceful note. With the photograph, he enclosed a sentiment which seemed to him, "although applicable to any situation in life," to be "especially fit to be borne in mind by every Judge, who, in the present time, is called on to administer and maintain the law."[52] He remembered she had studied Latin and so copied, in the original, four lines from the third Ode in the third Book of Horace's Odes:

> Justum et tenacem propositi virum—
> Non civium ardor prava jubentium,
> Non vultus instantis tyranni
> Mente quatit solida.

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[50] Tyler, p. 455.
[51] Tyler, p. 456.
[52] Tyler, p. 465.

In writing Tyler concerning her uncle, Mrs. Pendleton spoke of the "beauty of his life and character" and said that the sentiment "has a noble signification, as emanating from him. So truly is it the precept and example of his life."[53]

To the end of his life, Taney was a "constant reader of current literature" and enjoyed novels. The *British Quarterly Reviews* and *Blackwood's Magazine*, he read "with singular interest." Tyler informs us that[54] "newspapers, on all sides of politics, he had read to him daily. He had been fond of Macaulay's "History of England" and of Campbell's "Lives of the Chief Justices" and of the "Lord Chancellors of England." Shakespeare was one of his favorite authors.

In one of his later illnesses, Samuel Tyler sat up with him at night.[55] After Taney was convalescent, whenever Tyler would come to see him, Taney would lie in bed, smoking a cigar, and talk with Tyler "to such a late hour, that one of his daughters would come into the room to break up the conversation. The topics of conversation were such as showed as great familiarity with every day life as any gentleman at any age would possess." Dr. Grafton Tyler, for many years the Chief Justice's physician, remarked often that Taney was "like a disembodied spirit; for that his mind did not in any degree participate in the infirmities of the body."

Whenever friends came in to see him, he "inquired about everything that was going on."[56] During the autumn of 1864, he gradually failed in health and died, on October 12, in his eighty-eighth year. Friends car-

[53] Tyler, p. 467.
[54] Tyler, p. 485.
[55] Tyler, p. 457.
[56] Tyler, p. 484.

ried his body from Washington to the cemetery of the Jesuit Novitiate in Frederick, where they placed it beside that of his mother for whom he kept his love to the very last.[57] Two members of the Frederick Bar, to whom Tyler dedicated Taney's life, Judge Richard H. Marshall and James M. Coale, with the consent of Taney's family, placed over Taney's grave a plain flat stone—a suitable memorial of the simple life of the jurist.[58]

[57] Tyler, p. 485.
[58] Scharf's Chron. of Baltimore, p. 631.

CHAPTER XVI

After His Death

James Schouler has written[1] that Taney was "an able lawyer, an honorable judge, an austere, upright man, to whose virtues and talents it was impossible to draw close attention, or to do full justice, while present passions raged." It is surprising, however, how spontaneous and heartfelt a tribute was paid him, immediately upon the end of his life.

On the day after his death, William Price, Esq., eulogized him in the United States District Court at Baltimore, saying: "It was a privilege to be employed with him in the trial of a case in Court. . . . . In referring to the English authorities then most quoted, he would direct me to pass over the opinions of Kenyon and Grose and Ashurst and read what Buller said. He had great respect for the views of Lord Mansfield and thought Heath a very able judge." In one case, Price "found an authority directly with us in all its features, but I found also that, by a later decision, it had been overruled and I proposed to read the authority and rely on it, believing that the opposing counsel would fail to discover the later decision. 'But would you,' said he, 'impose a spurious authority upon the Court?'" Price continued.

[1] Schouler, History of the U. S., vol. VI, p. 527. He was a Union soldier during the Civil War and wrote elsewhere of Taney, that he had "many admirable traits of character—being learned in the law, painstaking, upright, and full of dignity." He could take "admiration unflinchingly," but was "wanting in the flow of healthy blood"—a rather mystifying expression. V History, 377.

Although dignity was a part of his nature, yet he was one of the most genial persons I ever knew. His acquisitions in general literature were not exhaustive, but there were certain books he had read with great interest and which he talked about with pleasure. Among them was Boswell's Life of Johnson, which he frequently declared to be the most delightful book that ever was written. He would repeat the sayings of the sage and those which were most surly seemed to please him best.

He had not a particle of what men call genius. His mind was made up of pure logic and whether before the Court or Jury, he had always something to prove and every word he uttered contributed to that end. His style of speaking, though of the very best English, was simple and devoid of ornament. There was an intense sincerity in his manner, his powers of persuasion being equal to those of any person I have ever heard. Mr. Wirt used to say[2] that he feared that angelic manner of his, more than all his other attributes. His power with the juries, which was very great, lay, as it always appeared to me, in his extraordinary faculty of so grouping and collating his facts as to impart to the circumstance which he chose to make the pivot of his argument an exaggerated signification from its position and the new relations it was made to bear to the other facts of the case. Minor circumstances were made to tell for more than their value, by the position in which he placed them.

Particular expressions of great force would at times fall from him. . . . In defending a person charged with an assault, who, though first assailed, had, as it was alleged, so used his privilege of self defence as to become a trespasser *ab initio*, he said: "Gentlemen, if a man have a head like a post, you must hammer him like a post." This sentence comprised the entire argument.

Judge William B. Giles, in his response, stated that, when he went upon the bench in 1853, he was a comparative stranger to Judge Taney, but that, "in all our intercourse, I have received from him the greatest

[2] This saying is also attributed to William Pinkney.

kindness, and consideration, and cordiality, which won for him my warmest veneration and esteem . . . I have never known a purer, or better man, one who loved his country more, or whose heart was more alive to every warm and generous feeling of our nature."[3] On the day following, October 14, a general meeting of the Baltimore Bar was held in the Superior Court Room,[4] more numerously attended than any former "professional assemblage ever held" in the City. Resolves were offered by Severn Teackle Wallis, Esq., and seconded by the eminent lawyer, William Schley, a native of Frederick, who had well known Taney's early career as a lawyer. In the course of his speech, Mr. Schley said that,

As a member of society, he was always distinguished for his exemplary life and conversation. He was, indeed, a high-bred Maryland gentleman and no one, who was brought into intercourse with him, could have been otherwise than charmed by his urbanity, his courtesy and his kindness. There was no manifestation on his part of conscious superiority. He exacted no deference, no homage, no reverence. These were accorded to him spontaneously.

[3] These proceedings and those of the following day were printed in a pamphlet.

The Baltimore Alumni Association of Dickinson College in 1910 printed a pamphlet in memory of Taney, containing a photogravure of the portrait of him painted by Richard Blossom Farley, which now adorns the wall of Bosler Memorial Hall in the College. The pamphlet contains the address of J. Henry Baker, Esq., of Baltimore, at the presentation of the portrait to the Dickinson in 1908.

The present writer prepared a sketch of Taney's life which was read before the P. L. Club in Baltimore in December, 1917, the Maryland Historical Society in April, 1918, and the Maryland Bar Association at Atlantic City in June, 1918, and which is printed in the Proceedings of the Association for that year.

[4] Scharf, "Baltimore City and County," 713. These proceedings were printed in pamphlet form contemporaneously.

He was generous to a fault. He gave freely and cheerfully with an open hand and willing heart out of his limited means.

He was deeply grounded in the elements of the law, from early and close study and familiar with the writings of eminent jurists. Although he carefully examined all decided cases, yet he never based his decisions (except in matters of practice) on the authority of another's opinion, unless a controlling decision, without it had the concurrence of his own approval and judgment, and it is noticeable, in reading his opinions, that he seldom refers to elementary writers, or even to judicial decisions. He drew from the accumulated fund of his own treasury of legal learning and he was self-reliant, because, with laborious industry, he had gathered largely in early life and had winnowed the chaff from the substance and had only garnered the latter.

He was eminently practical, he understood his causes, prepared for the trial of every case in which he was engaged, at any sacrifice of personal convenience and comfort, and, in his forensic efforts, was stimulated more by an anxious desire to perform his duty to his client than by considerations of personal distinction.

He had a temper, not merely quick, but naturally fierce, and yet his heart was full of kindness, benevolence, and generosity and he was even able to forgive his political enemies—he had no others—and died in charity with all.

Reverdy Johnson, the leader of the American bar, followed Schley and referred to Taney as presiding over the Supreme Court, "with a courtesy, dignity, and ability that challenged the admiration of all who were familiar with its proceedings, or studied its judgments." He possessed "all the requisite learning" and "the politeness of manner, which is so important to a satisfactory administration of the functions of judge. In early life, a diligent student at the bar, having a diligence that never tired, with a mind singularly accurate and at the same time comprehensive, with an elocution remarkably lucid and an integrity private and pro-

fessional, that no man of character ever ventured to question, from the moment he assumed the judicial station, he inspired universal confidence."

Johnson had differed from Taney in politics and Taney had been a "decided politician," but, when he was nominated as Chief Justice, Johnson felt that he would be "governed solely by justice and law" and "was not disappointed in this expectation." "During his entire judicial career, no man can say with truth that his integrity was ever for a moment sullied, or his judgments influenced by any other than the most elevated and legitimate considerations. So unerring was his mind, so discriminating his thought, and so full his research (a research wonderful, when we remember his own feeble state of health) that it happened in very few instances that his brethren differed from him and in yet fewer that his judgments on circuit were reversed."

No judge "possessed greater capacity nor manners more admirably fitted to make the practice of our profession pleasant and instructive, or who ever administered justice with more absolute impartiality."

Judge Merrick spoke next, remarking that the reputation of Taney's "talents and his inflexible adherence to what his judgment approved and his private worth, compelled him into public stations, which his modesty had not sought." Reference was made to "His countenance, so calm, so patient, so attentive, and to the deep light of his tranquil eye, which seemed to reflect back from the inner intelligence, illumination upon the arguments which were addressed to the court, and to the even hand with which he held the scales of justice."

Andrew Sterrett Ridgely had been a "frequent and always kindly received visitor at Taney's unostenta-

tiously hospitable board and by his truly happy and cheerful fireside." He remembered the "kind and benignant face" of Mrs. Taney, "that noble hearted wife and mother." He recalled also the "judge's" gracious urbanity and kindly courtesy" and his feebleness, which compelled him, "for years past, to recline upon the judgment seat when administrating justice."

Judge Martin of the Superior Court, who presided at the meeting, called attention to Taney's "perspicuity," as the "leading trait in his mental power." "There was no glare about his intellect, but it was perfectly luminous, so that, whether you admitted, or disputed his proposition, it was absolutely impossible not to understand what he intended to communicate." Judge Martin bore testimony to Taney's "bearing and deportment as a judge," as, "at all times, so graceful and urbane, so conciliatory and yet so fine" and to "his tone" which was "so elevated and refined."

The most wonderful testimonial to Taney, however, is to be found in the proceedings of the meeting of the members of the Bar of the First Circuit held at Boston. Three days after Taney's death, on Saturday, October 15, at a preliminary meeting a committee was appointed, composed of Benjamin R. Curtis, formerly Associate Justice of the Supreme Court, Caleb Cushing, formerly Attorney General of the United States, Richard H. Dana, Jr., the United States District Attorney, and Sidney Bartlett, Chairman of the Meeting, to prepare resolutions. The Committee reported to an adjourned meeting, on Monday the seventeenth[5] and the report, which was unanimously adopted, expressed "admiration and reverence for the preëminent abilities, profound learning, incorruptible integrity, and signal private

[5] Tyler, p. 508; Curtis's Misc. Writings, II, p. 336.

virtues exhibited in the long and illustrious judicial career of the late lamented Chief Justice Taney."

Then Curtis rose to speak. He had strongly differed from Taney in the Dred Scott decision and he had later supported him in the Merryman Case. No man in New England was abler and none of them knew Taney better. The major part of his address has been previously mentioned.

His conclusion was that "it is one of the favors[6] which the providence of God has bestowed upon our once happy country, that, in the period of 63 years, this great office has been filled by only two persons, each of whom has retained, to extreme old age, his great and useful qualities and powers. The stability, uniformity, and completeness of our national jurisprudence are, in no small measure, attributed to this fact."

The Rev. Dr. Clover, a clergyman of the Protestant Episcopal Church, preached a memorial sermon upon Taney in Springfield, Illinois, on November 6, 1864.[7] He had known the Chief Justice, "in the relations of social intercourse," and found him "most exemplary." "In nothing did his attractiveness of character more appear than in his happy and affable manner, coupled with the most graceful and dignified bearing, which rendered his society, even to the humblest, most congenial and delightful." A close student throughout his whole life, Taney spent most of his day in his library; "but, when evening came, at the simple announcement that some friend was in the parlor, it mattered not whether young or old, distinguished or obscure, the tall form of the old gentleman would enter, and the marked and peculiar features of his face light

[6] Tyler, p. 515, Curtis's Misc. Writings, II, p. 342.

[7] Tyler, p. 468. Peter Lewis Clover entered the ministry at Taney's suggestion.

up and beam with a pleasant smile of welcome which no words can express."

A year later,[8] General Robert E. Lee wrote Mr. Tyler that "my memory is full of the pleasure and improvement I always enjoyed in his company and in my intercourse with his charming and intellectual family."

The memorial meeting of the Bar of the Supreme Court occurred on December 6, 1864, upon the reassembling of that Tribunal.[9] Jonathan Meredith of Baltimore was made Chairman and said that, as representative of the next generation of lawyers to that of Taney, he desired to "mingle their sorrow with the sorrow of the whole American Bar, for the loss of a deeply read and profoundly learned lawyer, of an eloquent advocate, of a dignified, enlightened and upright judge, and of a Christian gentleman, whose purity of life was high beyond all reproach." A Committee, having the Hon. Thomas Ewing of Ohio as its chairman, was appointed to present resolutions, and in making their report, Ewing said: "I for one, knew him from his first accession to the Bench. I have been present at every term when he has presided in this Court since that time, from the first to the last; and I can bear ample testimony to his courtesy, to his kindness, to his consideration of the members of the Bar, to his judicial capacity and to his integrity as a judge." The report referred to Taney, as a man "of spotless and benevolent life," as "the model of a good man and a Christian gentleman." "Profoundly learned in the law and naturally gifted with a clear, direct, and logical mind, he, nevertheless, listened for instruction from the

[8] November 14, 1865. Tyler, p. 467.

[9] Tyler, p. 486.

humblest advocate who appeared before him in any case. With all the qualities of a good judge, and with the natural consciousness of his superiority to ordinary men, he was ever attentive and useful to those whose duty brought them before him to attempt to influence his determination as a judge, and none who knew him could doubt that his conclusions were always the result of conscientious and enlightened study and reflection."

Mr. Stansberry of Ohio then spoke of "that quiet dignity, that perfect composure and, above all, that amiability and goodness of heart," for which Taney "was so distinguished." For more than a quarter of a century the speaker had argued cases before the Supreme Court and "that long experience" gave Stansberry "confidence" in saying that Taney "never failed to sustain the dignity and requirements of the office." Although "he had long passed the age, when the most vigorous show signs of mental decay, his intellect seemed as clear as ever."

Reverdy Johnson spoke as a member of the Maryland bar, and as one who knew Taney as far back as 1815, when Johnson was admitted to practice at the Court of Appeals. He had enjoyed Taney's "confidence and his friendship, almost from the first, "and greatly did" Johnson "profit from it." In social life, Taney "was as attractive as he was instructive and eminent in professional life." He was esteemed "as much as a man," as he was "admired as a lawyer and a judge." "In everything he said from the Bench and in his uniform conduct as its chief, all saw how peculiarly fitted he was for his high office. While his mind, evidently, was capable of mastering, and uniformly mastered, the great, the momentous, judicial questions which were often before him, it was capable of solving and did solve, the

minutest which the rules of practice involved and upon which the correctness of so much of a judge's usefulness depends."[10] Charles O'Conor of New York followed Johnson and, in the language of perfervid hyperbole, exalted the Chief Justice, speaking of his clear, vigorous and perfectly unimpaired intellect," of the "strong emotions of affectionate and reverential regret at his death which were universally felt," of the "gracious dignity of his bearing and the stern impartiality of his judgment." On December 7, the next day, Mr. Ewing presented these proceedings of the Bar to the Supreme Court. After the resolutions were read, Mr. Justice Wayne, who presided, replied to them.[11] Wayne had sat on the bench with Taney, throughout the whole of the latter's judicial career and so his judgment possessed great value. In Taney's "honorable and useful life," he was early "marked to be one who could be relied upon on those public exigencies which require firm character and statesmanlike ability to manage and control successfully." "By temperament he was ardent. Its impulses, however, could only be seen in his eyes and heard in fervent language, when he was excited on an occasion; but he was never impetuous or vehement. He was courteous at all times to every one without affectation. He was cautious and circumspect, without being indecisive, and the resolves of his purposes and principles were habitually expressed in words showing the sincerity of his convictions, without offence to any who thought differently. He was generous and the only measure of his liberalities was his inability to

[10] In a letter to Tyler, among the manuscripts belonging to the Maryland Historical Society, dated July 14, 1871, Johnson wrote that he could not improve upon these remarks. (13 Md. Hist. Mag. 170.)

[11] Tyler, p. 502; 2 Wallace IX.

give more." "His control of himself and his temper was no doubt the result in part of a practical philosophy, but it had its foundation in his Christian faith." Wayne felt it a "happy occurrence" that two such men as Marshall and Taney "should have been Chief Justices in succession and that the life of each of them should have been so prolonged."

G. W. Searle wrote some keen sentences concerning Taney in a magazine article, which appeared in that month.[12] "His mind was comprehensive, acute, and logical; not brilliant, imaginative, or impulsive." "In reading, he was highly respectable, but he relied more upon himself than his library for correct legal conclusions. His patience in listening, his calmness in deciding, his candor, care, and independence in judging, were the admiration of the bar. A serious and hearty love of legal truths and a stern and unflinching devotion to legal justice were the great moral characteristics of the man." In the conduct of his court, he was a "pattern of a dignified Chief Justice. There was no pert colloquy with the bar, no hasty interruption nor rude suggestions. All was calm, deferential, and judicial. . . . . He relied on principles, rather than on precedent. He was more of a legal philosopher than a case lawyer. His legal common sense was worth more than a library of text books."[13] "Notwithstanding his ideas as to the right of property in man, he never adopted the Southern theory of States rights as a means of protecting that property; on the contrary, he held to the ideas of Jay, Marshall, Kent, and Webster, that our

[12] December, 1864. 10 Nat. Q. R. 51.

[13] Searle exaggerates, p. 57, in saying that "By whomsoever delivered, the opinions bear somewhat of the impress of Taney's mind and character." He defends the Dred Scott Decision.

national government derived its powers by direct grant of the people themselves, as individuals, and that it was not a simple confederation of Sovereign States, each at liberty to judge for itself when the compact of union was violated and to withdraw at its pleasure, or discretion, or even on its own view of necessity." His "constitutional system was a reflex of that of Marshall," except as to the United States Bank.

In the conference room, Taney "shone with especial lustre." His influence was "conservative of the past, rather than adventurous for the future." "Equally free from servility and arrogance," he was a "plain, feeble, unpretentious old man. . . . . The affable and winning manners of the man, the calm, equable temper, the uniform impartiality, the docility and equanimity of his temper to all who appeared before him are amply attested."

"His opinions are clear, concise and well written, but they do not indicate the elegant polish of a scholar, or the ripe culture of a man of letters." Scarle referred to Taney's regular habits. His life was abstemious, except than he was an inveterate smoker. He rose early and attended Court at 11 o'clock. After its adjournment, he took an hour's nap and then was wont to return to his labors in his library. He found "relaxation in the charms of domestic life and in agreeable but never ambitious conversation." "His friendships were firm and his affections strong."

All the comments made upon Taney were not eulogistic. Horace Greeley wrote[14] that Taney "had long been a main bulwark of slavery." "His natural ability, eminent legal attainments, purity of private character, fullness of years, and the long period he had officiated as

[14] 2 Am. Conflict, p. 671.

Chief Justice caused him to be regarded by many as a pillar of the State, and his death, at this moment, seemed to mark the transition from the era of slavery to that of Universal Freedom. Though he held his office and discharged its functions to the last, it was notorious that he did not and (with his views) could not sympathize with the President in his struggle against red handed treason."[15]

Charles Sumner[16] never lost his dislike for Taney. When Lyman Trumbull on February 23, 1865, moved to proceed with the consideration of a House bill to provide a bust for Taney, Sumner objected and compared Taney to the ship money judges, and to Judge Jefferys. "Search the judicial annals and you find no perversion of truth more flgrant." Sumner's objection prevailed, and no bust was then voted. He felt that in the "unrighteous judgment sustained by falsification" in the Dred Scott Case, "judicial baseness reached its lowest point."

After the death of Sumner and of Chief Justice Chase, in 1874, busts of both jurists were authorized to be placed in the Supreme Court Room by the unanimous consent of Congress and without debate.

Though he was diligent in the practice of the law until he was 59 years old, Taney left a small estate. In 1871, an unsuccessful attempt was made to raise a fund for the support of his daughters. On Feb. 11, a meeting was held in the Supreme Court Room for this purpose, presided over by the Attorney General, A. T. Akerman of Georgia. William M. Evarts and Montgomery Blair

[15] Greeley, unjustly, added: "Originally an ultra Federalist, Slavery had transformed him into a practical disciple of Calhoun." A southern view of Taney is found in G. L. Christian's address in Proceedings of Va. Bar Association for 1911, p. 180.

[16] Works, IX, 270. *Vide* Blaine, I, Twenty Years in Congress, 137.

spoke in favor of the project. Matthew H. Carpenter referred to "the purity of Taney's character, the frugality and temperance of his life, his devotion to the duties of his office, from which he never cast a longing look upon other places or preferments, the eminence of his abilities, his grasp of the most complicated causes and the most difficult questions—all are remembered with pride." Young lawyers "experienced his condescension and courtesy, his willingness, nay eagerness, to relieve their embarrassments and smooth to their steps the rugged points of a new practice. The apparent interest with which his benevolent face was always turned towards a younger, and consequently embarrassed, advocate" was never forgotten.[17]

Senator George F. Edmunds, the Nestor of American politics and law, bore testimony that, taking Taney "all in all, through his long career, he displayed to our people a purity, a skill, an industry, that has given renown to our most permanent institution, that of the judiciary, which has taught our people reverence, for law, for order, a lesson, I need not say, most eminently necessary in a free country."

Clarkson N. Potter remarked that Taney's "private life was a model of modesty, of kindness, of Christian courtesy." Mr. Justice Miller followed, with the statement that Taney was the only man he ever knew who showed, at a very advanced age, no imperfection in his mental faculties, and James A. Garfield called attention to the fact that, throughout all the dissent aroused in the North West by the Dred Scott decision, no word was ever uttered against Taney's personal character.

In 1867, the General Assembly of Maryland appropriated $5000 for a statue of Taney and, in 1870

[17] These proceedings were printed in pamphlet form.

increased this sum by an additional appropriation of $10,000.[18] The Commission selected the Maryland sculptor, William H. Rinehart, to execute the bronze statue and his work is quite successful. Taney is represented as in his old age, seated and clad in his robes of office. The strong features of his countenance are clearly delineated. The statue was placed in the State House Circle at Annapolis.[19] On December 10, 1872, the statue was unveiled and, in connection with the ceremonies, Severn T. Wallis, Esq., delivered an oration in the Senate Chamber.[20] Wallis reminded his hearers that the pathway of a great judge "does not lead through the realms of fancy," and he recalled that,

> When the great citizen, whose image is beside us, walked in his daily walk amid our reverence, the simple beauty of his private life was all before us. We can recall his kindly smile, his open hand, his gracious, gentle speech. The elders of our generation will remember how his strong nature was subdued by duty and religion to the temperance, humility, and patience which we knew. All of us saw and wondered how domestic sorrow, the toils of his station, old age, infirmity of body, ingratitude, injustice, persecution, still left his intellect unclouded, his courage unsubdued, his fortitude unshaken, his calm and lofty resignation and endurance descending to no murmur, nor resentment. . . . . It was a life of patriotism, of duty, and of sacrifice—a life whose aim and effect altogether were to be and do and bear and not to seem.

[18] The Commission to expend this appropriation consisted of Severn Teackle Wallis and George M. Gill of Baltimore City, G. Fred Maddox of St. Mary's County. Charles E. Trail and Hugh McAleer of Frederick County, James T. Earle of Queen Anne's County, and Henry Williams of Calvert County.

[19] The proposal was made that Taney's remains should be brought thither, but his own directions were too strong and too definite. A replica of this fine monument has been made and placed in Baltimore on North Washington Place, at the foot of the Washington Monument.

[20] Wallis's Works, I, p. 41 and ff.

Wallis then turned to speak of Taney's public career.

> It was the conviction of his life that the Government, under which we lived, was of limited powers and that its constitution had been framed for war, as well as for peace. . . . . He believed that the duty of the judges was simply to maintain the Constitution, while it lasted, and if need be, defend it to the death.
>
> He had lived a life so stainless that to question his integrity was enough to beggar the resources of falsehood and made even shamelessness ashamed. He had given lustre and authority, by his wisdom and learning, to the judgments of the Supreme Tribunal and had presided over its deliberations with a dignity, impartiality, and courtesy, which elevated even the administration of justice.

In the same year, 1872, Samuel Tyler, Esq., of Georgetown, D. C., published, through John Murphy and Company, a "Memoir" of Taney—a stout brown octavo of 659 pages, an invaluable source to anyone studying the Chief Justice's career. Tyler had long been Taney's friend and Taney himself had asked that Tyler write this book. His task was rendered the more difficult, because[21] the Chief Justice kept no copies of the letters which he wrote and, with very few exceptions, destroyed those which he received. Moorefield Storey, in reviewing the book, spoke of Taney as shown to be a "man of great simplicity[22] and elevation of character, of perfectly honest purpose, and of unyielding firmness, who never shrank from what he considered his duty, or suffered unworthy considerations to affect his judgment—a loyal, just, and upright gentleman in the best sense, in many respects a great man; but, though an able lawyer and an admirable judge, lacking the intellec-

[21] Tyler, p. X. Information from Jno. Mason Campbell, Taney's son-in-law.

[22] 116 North American Review, January, 1873, p. 194.

tual breadth which is a necessary element of greatness. The absence of all pettiness in his nature is very striking." It was his misfortune, upon two "conspicuous occasions, to incur the bitter hate of a powerful political party."

A. R. McDonough, reviewing the same book,[23] stated that it was Taney's misfortune "to be brought by the faithful discharge of his duty into opposition to the prevailing sentiment of his countrymen at a period of intense national excitement. His unpopular performance of a high conservative function— . . . incurred a tempest of aspersions, which time and reflection are only beginning to dispel." The clamor against his removal of the deposits was neither "popular nor generous." He deserved praise, rather than blame, for his share in that contest. "As a strong, calm, and pure man, filling blamelessly the highest station in the most troubled period of the national life, Taney will always remain one of the most venerable and interesting figures in the history of the country."

Nearly ten years later, in 1881, Clarkson N. Potter delivered an address upon Taney before the American Bar Association.[24] He compared Marshall with Taney and found that each had been a prominent and leading man, before he became Chief Justice, each exercised a controlling influence over the Court, each was a man of the highest personal integrity, and each had a certain simplicity of manner. Potter mentioned the "plain-

[23] 15 Nation, p. 300.

[24] 4 Am. Bar Association Reports, p. 176. Rhodes, a scholarly historian, spoke of Taney as a "good student of the law," who was an "untiring worker" who "gained solid reputation by accurate knowledge of the law, clearness of thought, and absolute purity of life. His written opinions are characterized by vigor of style, exemplifying the hours he passed with the masters of literature." (History, II, 249–251.)

ness" of Taney's life and recalled with pleasure "the singular gentleness and dignity with which he presided" on the bench and "the peculiar consideration he showed to young men." "He was, indeed, a man of iron will, of undaunted courage, of absolute purity, of respectable learning, of largest powers, kindest charity, and loftiest patriotism."

Some years later, Nicolay and Hay's "Life of Lincoln" appeared and these authors summed up their opinions of Taney's character thus.[25] He was

A man of amiable character, of blameless life, of great learning, of stainless integrity, yet such is the undiscriminating cruelty with which public opinion executes its decrees, that this aged and upright judge was borne to his grave with few expressions of regret. . . . . Toilsome and irreproachable as his life had been, so far as purity of intentions were concerned, it was marked by one of those mistakes which are never forgiven. In a critical hour of history, he had made a decision, contrary to the best hopes and aspirations of the nation at large. . . . . When he assumed public office, he became a part of the machinery of his party. He accepted their tenets and carried them unflinchingly to their logical results, so that, to a mind so upright and straightforward in its operations, there seemed nothing revolting in the enunciation of the dismal and inhuman propositions of the Dred Scott decision. His whole life was, therefore, read in the light of that one act and, when he died, the nation, he had so faithfully served according to his lights, looked upon his death as the removal of a barrier to human progress. The general feeling found expression in the grim and profane witticism of Senator Wade, uttered some

[25] Vol. IX, 385. Alexander H. Stephens styled Taney as an "eminent jurist," who "was no less distinguished for his public than his private virtues. In all the qualities which characterize a good citizen, as well as an able statesman, he had no superior in the country. By his legal and judicial attainments, he added new lustre to that Bench to which Marshall, whom he succeeded, had already given so much distinction and renown." (2 Const. View of the War Between the States, p. 261.)

months before, when it seemed likely that the Chief Justice would survive the administration of Mr. Lincoln: "No man ever prayed as I did that Taney might outlive President Buchanan's term and, now, I am afraid I have overdone it."[26]

It is remarkable that so high a meed of praise for Taney was extorted from two such hostile critics as the writers of that work.

A later estimate of Taney was made in 1892 by Francis R. Jones[27] that the Chief Justice was a "great technical lawyer," possessed of greater legal learning than Marshall. Jones thought that the Dred Scott Case was a blunder and that Taney's career was almost as pathetic as that of Oedipus. His chronic ill health and great physical weakness, impaired and lessened Taney's influence in the Court, yet Jones found that: (1) the Chief Justice "straightened, systematized, and settled" the rules of practice in the Supreme Court, "upon a basis from which all subsequent rules have arisen;" (2) he fixed the law concerning the citizenship of a corporation as that of the State creating it; (3) he preserved the constitutional rights of the States in the Charles River case; and (4) he placed the admiralty jurisdiction of the Federal Government on a board basis, in the case of the *Genesee Chief*.

After another decade, John A. Schauck, Chief Judge of the Supreme Court of Ohio, reviewed Taney's career.[28] After defending Taney's political course, Schauck wrote that the national authority was "obviously and illogi-

[26] A 68 page pamphlet, attacking Taney as "The Unjust Judge," is said to have appeared in 1865. 4 Green Bag, p. 6.

[27] 4 Green Bag, p. 1, with portrait. In 1895, 7 Green Bag, p. 351, an article appeared upon Taney by E. S. Taney, which is agreeably written, but contains nothing of importance.

[28] 14 Green Bag, p. 559, December, 1902. An article upon the "Taney Bench" by Andrew McKinley appeared in 16 Green Bag, p. 369.

cally relaxed" in the decisions made under Taney. The former decisions were not overruled, but neither were they "always applied to new cases, to which they were logically applicable, and doctrines inconsistent with them were declared," without the Court being conscious of departure from the earlier courses.

That Taney "was free from prejudice against what he believed to be legitimate federal power is shown by cases, in which he aided in extending it beyond the limits which some of his associates thought proper." Most of his departures from former doctrines related to the commercial powers, toward the limitation of which his early experience as counsel for the State in Brown v. Maryland had drawn him.[29] On the bench, he held his way, with marked "dignity and propriety."

Let us hear the conclusion of the whole matter as it appears to this biographer. Roger Brooke Taney was a clear-thinking, able, high-minded, hot-tempered, narrow, pertinacious, brave, prejudiced man—a devout Christian and a faithful member of the Roman Catholic Church—the Church of his mother. From his father he inherited his high temper and his position as a Federalist. He remained a Federalist until his death, loving the Union and never advancing to the position of a Nationalist. He trusted his friends and was not one easily to forgive an adversary. Brought up in a community of slaveholding planters, he might emancipate his own slaves, but could not rid himself of his predilection toward slavery. An ardent politician in his early years, he was able, for the most part, to restrain

[29] Schauck praised the Merryman opinion, but maintained that the Dred Scott one was wrong and unnecessary, for Scott had become free by virtue of his residence in Illinois, unless the Missouri Court's decision should be upheld, and when it was upheld the Missouri Compromise question disappeared from the case.

his political feelings after he had ascended the bench, save in one notable instance. When he had once conceived an idea, it was very hard for him to relinquish it, and some of his most important public acts were determined by his prior relationships to men, in a way more complete than is usually the case. He was a keen and skilful advocate, never hesitating to take a case because there was small chance of winning it. As a judge, his great success lay in points of practice and in questions of admiralty law. He was deeply versed in the principles of the Common Law, without being a great student of history or of general jurisprudence. His decisions are well characterized by a judicious writer in Appleton's Annual Cyclopaedia for 1864 as cautious, sensible and sound. His constitutional decisions were those of a man who loved the country and its form of government, but who never forgot the composite and federal character of the United States.[30]

Forty years ago my father took his young son for a walk in Frederick and, stopping in front of a small house in the outskirts of the town, said: "There lived Roger B. Taney, Chief Justice of the United States, while he practiced law at the Frederick bar. He removed the government deposits from the United States Bank, which was wrong; he made the Dred Scott Decision, in which he was wrong again; but he was a great judge and a good man." Two score years have passed and, after a careful study of the life of the jurist, I would not change the judgment, made when first I heard of Taney—he was wrong in his policy in those two most conspicuous experiences of his life—but he was a great judge and a good man.

[30] One of the first pieces of work done by me, as a graduate student in history, was a study of the Dred Scott Case.

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